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8<sup>o</sup> Jur. L. 666.

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54. 1830

THE  
**CONVEYANCER'S**  
  
**MANUAL.**

---

By **SOLOMON ATKINSON, Esq.**

OF LINCOLN'S INN, BARRISTER AT LAW.

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**LONDON:**  
**SAUNDERS AND BENNING, LAW BOOKSELLERS;**  
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8<sup>o</sup> Jur. 1830. 2.  
666.



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## P R E F A C E.

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IT has been my object in the following pages, to give a concise and plain outline and description of the principal deeds and modes of assurance now practised by the most skilful conveyancers.

The language of deeds has in a particular manner engaged my attention.

In compiling this work, I have had considerable assistance from quarters most able to confer it; but, to which, I am not at present permitted more particularly to allude.

It has been suggested to me, that a more numerous citation of cases, would have made this little work more useful. With reference to this suggestion, I have only to remark, that the cases connected with the law of real property and conveyancing, are so fully stated in my treatise on that subject, that to have loaded the present volume with them, would only have been to repeat imperfectly, what I had already done in another work, to which, from the general similarity of arrangement, reference could at all times be easily made. Besides, it seemed hardly necessary to cite cases in support of doctrines which are clearly settled in the opinion of the profession.



It may also be noticed, that a very considerable part of the following pages, is occupied rather in stating the practice of conveyancers as settled by common concurrence in their domestic *forum*, than in the discussion of matters which belong more properly to the cognizance and decision of a public court.

I am aware, that writers on conveyancing have in general been rather sparing in such details,—probably because they did not deem them sufficiently important. I however think differently ; it appears to me, that to the young conveyancer such details are, more than any others, practically useful, and under this impression the following Manual has been drawn up.

S. ATKINSON,

1st Feb. 1830.

8, Old Square, Lincoln's Inn.

# CONTENTS.

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## CHAP. I.

### OF DEEDS.

Sect.	Page
1. Of the parties .....	1
2. Of the recitals .....	5
3. Of the witnessing clauses .....	40
4. Of the declarations .....	47
5. Of the covenants .....	56
6. Of the execution of deeds .....	67

## CHAP. II.

### OF SETTLEMENTS.

1. Of the settlement of personal estate .....	69
2. Of the settlement of real estate .....	79

## CHAP. III.

### OF WILLS.

1. Of the general form and provisions of a will of real and personal estate .....	95
2. Observations applicable to a will of real and personal estate or of personal estate only .....	103

## CHAP. IV.

### OF COPYHOLDS.

1. Of the deed of covenants on the purchase of copyhold lands .....	124
2. Of the deed of covenants on the mortgage of copyholds .....	129

## CHAP. V.

## OF MORTGAGES.

Sect.	Page
1. Of mortgage by way of demise, and of the transfer thereof .....	131
2. Of mortgages in fee, and of the transfer thereof.....	135
3. Of the mortgage of leasehold for lives and years....	143
4. Of the mortgage of West Indian property.....	146

## CHAP. VI.

OF LEASES .....	150
-----------------	-----

## CHAP. VII.

## OF PURCHASE-DEEDS.

1. Of the conveyance on the sale of an estate, free from incumbrances .....	168
2. Of the conveyance on the purchase of an estate, subject to a mortgage.....	190
3. Of the conveyance on the sale of lands, subject to rent-charges, annuities, &c.....	193
4. Of the conveyance of leasehold for lives.....	197

## CHAP. VIII.

## OF ASSIGNMENTS.

1. Of the assignment of long leaseholds on a sale of them.	205
2. Of the assignment of lands held by a lease for years, under ecclesiastical or other corporations.....	207
3. Of the assignment of terms to attend the inheritance.	210
4. Of the assignment of <i>choses in action</i> .....	213

## CHAP. IX.

## OF DEEDS OF PARTITION.

1. Of partition by simple conveyance among the parties.	225
2. Of partition by bill in equity.....	228
3. Of partition by act of parliament.....	229

## CHAP. X.

### OF DEEDS TO LEAD THE USES OF FINES AND RECOVERIES.

Sect.	Page
1. Of the tenant to the <i>præcipe</i> .....	231
2. Of the recitals.....	233
3. Of the declaration of the trusts in a new settlement..	234
4. Of the operation of fines and recoveries .....	235

## CHAP. XI.

### OF PARTNERSHIP ARTICLES..... 241

## CHAP. XII.

### OF RE-CONVEYANCES..... 246

## CHAP. XIII.

### ON THE APPOINTMENT OF A RECEIVER.. .... 250

## CHAP. XIV.

### OF ESTATE BILLS..... 255

## CHAP. XV.

### OF THE GRANT OF RENT-CHARGES AND ANNUITIES... 272

## CHAP. XVI.

### OF THE APPOINTMENT OF NEW TRUSTEES... .... 278

## CHAP. XVII.

### OF COMPOSITION DEEDS... .... 281



THE  
CONVEYANCER'S MANUAL.

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CHAPTER I.

OF DEEDS.

1. *Of the parties.*
  2. *Of the language and order of the recitals.*
  3. *Of the witnessing clauses.*
  4. *Of the declarations.*
  5. *Of the covenants.*
  6. *Of the execution and attestation of deeds.*
- 

SECTION I.

*Of the Parties.*

EVERY person who gives or receives, by his own contract, any interest under a deed, must be a party. <sup>Who should be parties.</sup>  
An estate in *remainder* may be given to a person who is not a party, but if it be intended that he should be bound by the deed, he *must* join.

It frequently happens that persons join in a deed, who neither grant nor receive any interest by it, merely for the purpose of recording their concurrence, and so preserving the most effectual evidence of their having notice of its contents ; as, for example, where the mortgagor is made a party on a simple transfer of the

CHAP. I.  
SECT. I.

mortgage, a first mortgagee on a mortgage to another person, the commissioners in a mortgage by particular tenant of lands under an Inclosure Act for the purpose of paying expenses, &c. &c. Where several persons claim under the same title, they should be classed together, and constitute one party. Where the same person sustains different characters, he should be made a party in as many parts as he sustains characters. For instance, in a marriage settlement, an individual may be executor to one person, heir-at-law to another person, and one of the parties to the marriage contract, and should therefore appear on the deed in three parts. So a person may have a *separate* interest as to one part of the transaction, and a *joint* interest as to another, and should therefore be in two parts.

Description of  
parties.

The parties should be described by their christian and surnames, their residence, and their rank, profession or title: Sometimes it may be convenient, for the purpose of saving expense, to state shortly the character in which the parties appear on the deed. It is necessary to mention the character which a person sustains where he joins in several parts, as for example—"This indenture, made &c., between *A. B* &c. of &c., (trustees of "a term of 500 years, created of and in, among other "hereditaments, the annual sum, fee-farm rent or yearly "rent-charge of £300 hereinafter particularly described "in and by the codicil to the last will and testament of "[*testator*], late of &c., esq. hereinafter recited, and also "executors of the same will, of the first part, *C. D* of "&c., esq., eldest son and heir-at-law of the said [*testator*], testator of the second part; *E. F* [*husband of* "*daughter*] of &c., esq., and [*Mary*] his wife (late — "spinster) one of the daughters and younger children of

"the said [*testator*] deceased, for whom portions were "provided under the aforesaid term of 500 years, of the "third part; the said (*one of the trustees already named*) "the surviving trustee named in the indenture of &c., "hereinafter recited, of the fourth part; the said [*mort-* "*gagees*] of &c., of the fifth part; and [*trustee for mort-* "*gagees*] of &c., a trustee named by the said [*mortgagees*] "for the purposes hereinafter mentioned, of the sixth "part." Generally speaking, however, this mode of introducing the character of the parties is to be avoided whenever it can, by means of recitals disclosing so much as is necessary for the purpose of rendering the transaction intelligible.

Where the deed is the settlement of a family estate, the parentage of the parties should be stated so far as is necessary to show what relation subsists between the present settlor, and the person who made the last settlement; so that by means of the principal family deeds, the chain of descent may be recorded and preserved.

In a conveyance of the unsettled personal estate of the wife, she is not a necessary party, as all such interests may be leased, assigned or surrendered without her concurrence.

Where two persons join in lending money, and take a joint security, though the entire legal estate is in the survivor, yet the personal representatives of the deceased mortgagee must join in the reconveyance, in order to get the estate discharged from their shares of the mortgage money. To avoid the necessity for this, the mortgage deed should contain the following declaration:—"And it is hereby agreed and declared, by and "between the parties to these presents, that in case of the "death of either of them, the said [*mortgagees*], before

Parties in the  
reconveyance  
of a mortgage.



CHAP. I.  
SECT. I.

“the aforesaid principal sum of £—— and interest there-  
“on, shall have been repaid by the said [*mortgagor*] his  
“heirs executors administrators or assigns, it shall be  
“lawful for the survivor of them his executors adminis-  
“trators or assigns to receive the said sum of £—— and  
“interest thereof, or any part thereof, and that his or  
“their receipt or receipts shall be an effectual acquittance  
“and discharge for the same.”

When trustees  
should join.

Trustees must all join both in conveyances and re-  
ceipts, unless any of them have disclaimed,—the trustee  
so disclaiming ought not to join. Trustees to bar dower  
should always be made parties when their concurrence  
can be obtained, though there is no necessity for their  
doing so if the purchaser be satisfied that the power  
was well created and is still subsisting.

Parties in an  
assignment of  
mortgage.

On an assignment of a mortgage, the mortgagor ought  
to be a party, otherwise the assignee takes subject to  
the account between the mortgagor and mortgagee.

—on sale of  
bankrupt's  
estate.

On the sale of a bankrupt's estates under a commis-  
sion, it was always considered desirable to have the  
bankrupt join in the conveyance, whenever his con-  
sent could be obtained, because thereby the necessity  
of proving the regularity of the commission was avoided  
and a regular chain of covenants kept up, and the  
bankrupt thereby released the estate from any charge  
upon it which might arise from his right to the surplus,  
if there happened to be any: And now, under the late  
bankrupt act, the bankrupt will be ordered, on the  
petition of the assignees or purchaser, to join in the  
conveyance, “if the bankrupt shall not try the validity  
“of the commission, or if there have been a verdict at  
“law establishing its validity.”(1)

(1) 6 Geo. 4, c. 16, s. 78,

The parties should be in this order:—the conveying before the receiving parties; the legal before the equitable owner; the freehold before the chattel tenant; persons having estates before those having mere rights; and these latter before consenting parties; the vendor follows the whole of the conveying parties, but the purchaser precedes the parties on his behalf; trustees of the fee come before trustees of the term, and these according to the priority of terms.

CHAP. I.  
SECT. II.  
Order of the parties.

## SECTION II.

### *Of the Recitals.*

Singular as it may appear, experience universally shews that no part of a deed requires more attention than the recitals, and nothing contributes so essentially to the clearness and general neatness of the draft as a well arranged and clear statement of these introductory details. The main purpose of the recitals is to explain the transaction which the deed effectuates, to unfold the objects and inducements of the parties, and to furnish the means of obtaining and preserving evidence of the title. It would be obviously impossible to describe all the varieties which this part of the deed may assume, and to anticipate every difficulty which may arrest the career of the young conveyancer; all that can be done, is to lay down a general outline of the points to which he should direct his attention, and to state the general principles established by the most eminent draftsmen. Long practice in drawing, or a familiar acquaintance with the most approved forms and prece-

Importance of recitals.

dents, can alone furnish that extent and variety of information which constitute the accomplished conveyancer.

Whoever would attain to a great facility in the practice of conveyancing is strongly recommended to confine himself, in general, strictly to settled forms, whether it be in the recitals or in the operative or other parts of a deed ; and never to indulge himself in the idle license of departing from them farther than the peculiar circumstances of any case may render essential, except where some recent decision of the courts, or the result of more extended experience, may have suggested some change or addition which will be proper to be introduced on all future occasions. Such a practice is essential to the attainment of accurate habits of drawing, facilitates instruction materially where that is the object, and promotes, in every way, the despatch of business and the availableness of clerks and pupils. To gentlemen in established practice it is also necessary, with a view to the satisfaction of clients, who are familiar with these drafts, to adhere closely to the same forms. There is also this convenience, that when the recitals are prepared agreeably to forms which have been carefully settled and approved, the draftsman can pass easily over this part of the instrument, and settle with more care the operative and essential parts of the deed.

Recitals practically essential.

Recitals are commonly said to be not an essential part of the deed, and, in a certain legal acceptance, this may be admitted to be true ; but yet, nevertheless, the conveyancer who should attempt to introduce into practice a deed without recitals, would probably find that his client considered them to be a very essential part of the document, whatever might be the language of the courts or report-books to the contrary. Techni-

cally and legally it may be said that recitals are not essential,—practically they are.

CHAP. I.  
SECT. II.

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Recitals are of modern invention, and their object is to give a history of the title since the last purchase-deed, where the transaction to be recorded is a purchase, for the purpose of shewing a connection of title and keeping up an entire chain of warranty. In other transactions, so much must be recited as is necessary to shew that the parties have authority to do what the deed in preparation proposes to effect.

Recitals are employed either in stating the substance of so much of the preceding deeds, and other assurances of the title, as are necessary in the present transaction ; or in disclosing certain collateral facts, as deaths, descents, marriages, and representation by executorship, letters of administration, &c.

Where the deduction of title is not multifarious it may be recited by each separate document, but where it is multifarious it will be proper to combine and give the effect of the several intervening instruments when that can be effected ; as, for example, where there have been several mortgages which have ultimately become consolidated, it will be sufficient to state that the party had created several mortgages which by divers mesne assignments have become vested in the conveying party. Where a defect has been *remedied* it may be recited, but when it is not cured it should be passed over *without notice*. Where a consequence of law is stated, the technical words are,—“ by reason whereof.” The technical mode of reciting a probable circumstance is,—“ and whereas there is reason to believe.”

General rules  
to be observed  
in recitals.

It is a general rule, that where a reasonable presumption of a fact arises, and such fact does not exist,

CHAP. I.  
SECT. II.

---

a negative recital should be introduced for the purpose of rebutting that presumption; as, for example, on a marriage, the presumption is that a settlement will be made; if none is made, that fact should be distinctly averred. So where the recital is general, negative words should, if necessary, be introduced to confine and restrain it.

Recitals, when  
evidence.

Recitals are admissible in evidence by way of estoppel against all persons parties to the deed, but they are no evidence against third persons, except corroborated by collateral circumstances (1); though even against strangers, where the evidence has gone for a long period conformably to them, the recitals will be admitted for want of better evidence. Thus, where a leasehold title is derived through successive assignments, and the lease is lost, the recitals are evidence of the state of the title as against all persons except the lessor (2). The recital of a lease for a year, of lands in England, is an estoppel in evidence as against the parties and their heirs; but it may be doubted whether it would be so as against issue in tail and remaindermen, since they are not bound by estoppel (3). The recital of a lease of lands in Ireland, is, by an Irish Act of Parliament, conclusive evidence of a lease; and as to lands in Jamaica, and others of the West-India and American colonies, a lease for a year is, by acts of the several colonial legislations, rendered unnecessary (4).

(1) Per M. R. in *Fort v. Clarke*, 1 Russ. 601.

(2) *Holmes v. Ailsbie*, 1 Madd. 551; 3 Prest. Abstr. 30; 1 *ibid*, 11.

(3) But see 3 Prest. Abstr. 29.

(4) See *Atk. Prec. in Conv.*, title "Colonial Conveyances," where will be found a general outline of the colonial laws as to conveyances.

In reciting an agreement, it is sufficient to state the terms of it, without entering into the various inducements that led to it; except where the transaction is between attorney and client, trustee and *cestui que trust*, guardian and ward, father and child, &c.; for, in these cases, the law regards the negotiation with so much jealousy that all the motives and grounds of action should be fully stated. On the other hand, the recital of the contract or agreement, and object of the deed, is, in equity, of material importance; for if the operative part of the deed should, from mistake, vary in substance from the agreement, the court will reform the legal operation of the deed, and the recital will be controlled by the body of the deed, if on taking the whole instrument into consideration such appears to have been its meaning (1).

On the sale of an estate, consisting of distinct parcels held under different titles, the rule is to begin the recital with the most valuable part, and shew a clear identity between the old and modern description of the parcels.

A deed may be recited in two ways. By the one, the effect only of the deed is given; the language of it either not being adopted at all, or only in a very small degree. Thus it may be recited,—“AND WHEREAS “by indentures of lease and release, bearing date the “7th and 8th days of &c., respectively, the release being “of five parts, and made between &c., the messuages or “tenements, lands and other hereditaments hereinafter “described, were conveyed and assured by the said *A. B* “to the said *C. D* in fee, free from encumbrances”; or it may be recited that a conveyance was “to such uses

(1) *Dearden v. Lord Byron*, 8 Pri. 417.

“as *A* should appoint in manner and by the means in  
“the said indenture mentioned, and in default of ap-  
“pointment and subject thereto, To the use of *A* for life,  
“with remainder to *B* and his heirs, for the life of *A*  
“and his assigns, with remainder to *A* in fee.” Recitals  
so formed are in general introduced only where the  
brevity of the draft is a material object, or where the  
deed so recited is matter of inducement rather than an  
essential link in the chain of title. In such a case it is  
enough if the effect of the deed be accurately compre-  
hended, and that effect clearly and concisely stated.  
Such a mode of recital can, however, be recommended  
to the young practitioner only in those cases where the  
true construction of the instrument is so clear, that  
there can be no doubt whatever of its legal and technical  
effect. In these cases also, it is always to be remem-  
bered, that that should never be stated as the effect of  
the deed or will, which is in fact only the *probable con-*  
*struction* of it. The precaution here suggested indeed  
admits of a far more extensive application, for it is the  
bounden duty of the draftsman to take care that no  
statement of facts, nor any recital of former instruments,  
should ever appear on the face of a deed, which can,  
either directly or indirectly, lead the parties to any mis-  
apprehension as to the state of their title. Whoever,  
therefore, introduces a recital in the brief mode which  
has been here pointed out, should take care to satisfy  
himself, that so clear is the effect of the settlement, or  
will, that no reasonable doubt can be entertained of  
it. From neglecting to attend to these considerations,  
titles, which often appear good on the face of the  
recitals, would be doubtful, or absolutely bad, if the  
deeds themselves were examined.

With these preliminary observations, it will now be proper to examine in detail the proper form of recital in ordinary cases. With this view, it will be convenient to consider the successive parts of the deed supposed to be in recital, under the following order:—

1. The style of the Deed.
2. The Date.
3. The Parties.
4. The Recitals.
5. The Witnessing part, or Operative Clauses.

1st. *As to the style of the deed.*—Deeds are either Indentures or Deeds Poll. The recital of the former should commence thus,—“WHEREAS by indenture bearing “date” &c.; that of the latter thus,—“WHEREAS by a “deed poll under the hands and seals of &c., (*those parties only who execute*).” If the instrument be not, in point of fact, a deed, but merely a writing under hand and seal, the recital should commence thus,—“WHEREAS by an instrument in writing, under the hand and seal of &c., bearing date” &c.

Recital of the style of the deed.

In reciting deeds it is a common practice to give them the name which denotes their supposed legal operation, as instead of saying, “by indentures bearing date,” &c., to say, “by indentures of lease and release bearing, &c.” or “by indentures of lease, and release and appointment,” or “by indenture of assignment,” &c., or “by indenture of bargain and sale,” &c. Except, however, in the case of a lease and release, which are two instruments so connected as to have no effectual operation without each other, (and consequently they should always be named in the manner above-described) it seems better and more correct to take no notice of the legal designa-



CHAP. I.  
SECT. II.

Recital of the  
date.

tion of the deed, but to let its contents, as subsequently disclosed, speak for themselves.

*2nd. As to the date.*—It is very material that the date of the instrument should be accurately stated, and hence has originated the practice of referring to the date, not in precise terms, but in some such form as this,—“WHEREAS by indentures of lease and release, and appointment, the lease bearing date on or about the 6th day of April, 1829, and the release and appointment on or about the 7th day of April, 1829;” or, “WHEREAS indentures of lease and release, bearing date respectively on or about the 9th and 10th days of March, 1829.” The advantage resulting from this mode of reciting the date is, that if it happen to be wrongly stated, extrinsic evidence may be admitted to fix the day and support the recital.

Where a deed is of several parts it is usual to notice this circumstance in these terms,—“WHEREAS by an indenture of three parts, bearing date &c. ;” or, “WHEREAS by indentures of lease and release, bearing date respectively, &c., the release being of five parts and made &c.” If it happen that the parties to the release are the same as those to the lease, then the recital may more properly be thus,—“WHEREAS by indentures of lease and release, bearing date &c., and both made,” &c.

Where the deed in recital is of the same date as the reciting deed, then the proper form is this,—“WHEREAS by indenture bearing even date with these presents,” &c. or, “WHEREAS by a deed poll under the hands and seals, &c., and bearing even date herewith,” &c., or if the instrument in recital be a release grounded on a lease, then as follows,—“WHEREAS by indentures of

"lease and release, the lease bearing date the day before  
 "the day of the date of these presents, and being of two  
 "parts, and made &c., and the release of five parts bear-  
 "ing even date herewith, and made &c."

Sometimes a deed is dated on one day and executed subsequently, and it is not unfrequently material to shew this fact, which may be done thus,—“WHEREAS  
 “by indenture bearing date on or about &c., and made  
 “&c., being an indenture which was first sealed and  
 “delivered by A. B. on the —— day of ——, in the  
 “year &c., —” a circumstance of course which need be stated only in those instances where the deed, if executed at the time it bears date, would have been invalid or ineffectual for the purpose now to be accomplished.

3rd. *As to the parties.*—Parties in deeds are usually described by their christian and surnames, place of abode, their title and profession or business, and sometimes by the character which they fulfil, as heirs executors, trustees, commissioners under an inclosure act, &c. The names of the parties are generally introduced in these words, “WHEREAS by indenture bearing  
 “&c., and made or expressed to be made between &c.”  
 In general the names of all the parties should be mentioned in the recital, though where it is important to be concise, and the parties are very numerous, and many of them, as frequently happens, have little or no concern with the title, then it will be quite sufficient to refer to them in this way,—“WHEREAS by indentures of lease and  
 “release bearing date respectively, &c., the release  
 “being of five parts, and made or expressed to be made  
 “between A. B of the first part, C. D of the second  
 “part, several other persons of the third part, several

Recital of the  
 parties.

“other persons of the fourth part, and *E. F* of the fifth “part,” &c. It is not uncommon, however, to see these useless names with all their additions of place and profession set out at full length, a practice which deserves to be severely reprehended, and which can have no other object than to increase the expense and to swell the deed with useless and cumbrous details.

Where the creation of a term is recited, and the term was created by an indenture of a distant period, it is quite immaterial, as to the reciting deed, what was the residence, description, or character of the grantor or grantees of the term; but where it was created within a short period, it is useful to know, and it is in general proper, to state these facts. So in the assignment of terms, it is very immaterial what was the residence or description of a former assignee. A similar observation applies to parties trustees, where the trusts have been performed. But if, on the other hand, the reciting deed is for the purpose of effecting a transaction which is to carry on the title through the medium of the heir, executor, or administrator of a former assignee, trustee, &c., as owner, it is very desirable that the residence of such trustee, &c. should be known, and ought therefore to be stated. So where there are several trustees, and the title is to be derived through the survivor of them, the residence and description of all the trustees should be stated, since the evidence which is to make out the fact of survivorship must have reference to the identity of persons and consequently depends on their place of residence and pursuits, &c.

The first deed to be recited will sometimes, by the description of parties, introduce a reference to, and, consequently, notice, of a former deed, will, or other instru-

ment. Thus *A*, the granting party, may be described as the devisee or heir-at-law of *B*: when described as the heir-at-law, the intimation of his character thus conveyed necessarily leads to the enquiry whether *B*. died intestate,—if mentioned as devisee, this, as necessarily leads to enquiry for the will of *B*. In either case, and indeed in all similar instances, the deed now supposed to be in preparation should be contemplated as one which at some future period may become the first document in the history of the title; and as it is desirable that such an instrument should be as free as possible from all reference to any other, one of these two plans ought to be adopted,—either the description which would lead to any inquiry for a will, or as to an intestacy, should be omitted, or such facts should be stated, or so much of the deed in question should be recited as will furnish the information which at some future period may possibly be demanded on these points. Thus, on the description of a person as heir of *B*, it may be stated, “that *B* died intestate, and was buried at —, on or about “the — day of —, and that letters of administration “to his effects were obtained from the consistorial court “of — on or about the — day of —.” If he be mentioned as devisee, there may be an averment that the will bears date on or about the — day of —. If in the deed now in recital the will itself were recited, that recital should be introduced in the deed supposed to be in preparation.

Where some of the parties are dead, and the deed is to refer to their deaths, or is to treat the title as free from incumbrances in consequence of their death, or death without issue, &c., it is very convenient to the ready and correct understanding of the deed to refer to

CHAP. I.  
SECT. II.

Recital of  
recitals.

these parties as soon as named, as being deceased or dead without issue, &c., in such terms as will at once manifest the fact material to be known.

*4th. As to the recitals.*—As a general rule it may be laid down, that it is proper to pass over the recitals, and go at once to the operative part of the deed.

When, however, it is deemed proper to take any of the recitals, the best plan seems to be to state them in the order of their date, and as independent and substantive recitals carrying on the history of the title in progressive order.

Subject, however, to these general rules, it will often be necessary to introduce some of the recitals of the deed in recital, especially where the operative part is so dependent on them that it could not be clearly understood without reference to them. Instead, however, of reciting them as recitals, their effect may sometimes be more simply introduced, and the operative part of the deed made equally intelligible by an allegation expressive of their general effect. If, for example, in the deed under recital a will has been recited, and then the operative part conveys “all the manors, messuages, &c. “hereinbefore described.” In this case the recitals may be passed over, and the deed recited as a “conveyance of “all the manors, messuages, &c. which were devised by “the thereinbefore recited will of, &c., bearing date, &c.”

In recitals of deeds prepared by unskilful draftsmen, it is not unusual to find the difficulty which has been here noticed got rid of in this way,—“after reciting “as therein is recited, it is witnessed, &c. &c.” Nothing can be more inconsistent with correct practice, or shew more clearly the ignorance or negligence of the draftsman. The sub-recital (to coin a new word for the sake

of conciseness) is either material or immaterial,—in the former case it should be given, in the latter there ought to be no reference to it.

CHAP. I.  
SEC. II.

Where part of the recitals are given and part rejected, this circumstance should be noticed in these or the like terms,—“AND WHEREAS in the said indenture, of &c., “it is among other things recited that, &c.” It frequently happens that the sub-recitals are the same as those which form a substantive part of the deed in preparation; and, in such a case, it will be sufficient to notice them in this way,—“after reciting as hereinbefore is recited, &c.” If it happen that part only of the sub-recitals are directly stated in the deed in preparation, then the additional recitals may be introduced thus,—“after reciting the hereinbefore recited will of the said, &c. “and also the indentures of lease and re-lease, bearing date, &c., it is further recited that, &c.”

It is not uncommon to find the sub-recital erroneously stating the date of a deed; in such a case it would be proper to advert to the mistake, which may be done in some phrase like this, “after reciting the hereinbefore recited will, bearing date, &c., and therein, by mistake, recited as bearing date, &c.” And so as to any other mistake in names, quantities, &c. the correction may be stated in a similar manner; and sometimes it may be necessary even to introduce a recital for the mere purpose of correcting a mistake of this kind.

In preparing a draft, attention should always be paid to the circumstance whether the recital in preparation is a recital of the language of the deed, or merely of its effect. In the latter case, it is enough if the substance and effect of the deed be accurately expressed,—in the former case it is essential to adhere closely to the deed,

CHAP. I.  
SEC. II.

and, as a general rule, neither to alter or omit any part of its language. Such a mode is correct in point of principle, and very convenient as a matter of practice, since it affords great facility to the parties through whose hands the deed must pass, for comparison and examination.

Recital of the  
operative part  
of a deed.

*5th. As to the operative part of Deeds.*—Where the motives, considerations, consent of parties, &c., are not requisite for the full understanding of the subsequent part of the deed, they may be slightly passed over, or even altogether omitted; and in such cases it will be sufficient to say, “that in performance of the therein recited agreement, and for the considerations therein expressed, &c.,” or “in consideration of the sum of £—— paid by the said —— to the said ——, &c., the receipt of which said sum, &c., is thereby acknowledged,” or where there are several considerations paid to distinct persons, the receipt may be recited thus,—“And the receipt of the said sums of £—— and £——, &c., are acknowledged by the persons to whom the same are severally expressed therein to have been paid.” The words of conveyance release and discharge should be given *verbatim*. The testification clause may be given briefly, and it will be sufficient to say, “testified as therein is mentioned,” except in those cases where the deed is executed under a particular authority or power, and the consent &c. is required to be given in a particular mode; for then it is material that the recital should disclose the manner in which the deed was executed and attested. In the best modern drafts, the mode in which the deed was attested and executed is usually stated in the introduction of the recital, in this way,—“WHEREAS by indenture bearing date, &c., and made, signed, sealed, &c., and as to their execution

"thereof, attested by two credible witnesses whose names "are thereon indorsed, &c." After the words of conveyance, &c., the limitations should be carefully stated; and where these are complex, and have reference to different kinds of property and various modes of transfer, all these facts must be distinctly disclosed in the recital, as well as the mode in which the several parties consent, convey, &c.

CHAP. I.  
SEC. II.

*6th. As to the Parcels.*—There are various modes of introducing the parcels into a deed. Sometimes they are stated in the recitals, sometimes in the operative part, and sometimes in one or more schedules annexed to the deed. According to these several modes of introducing them will arise corresponding changes in the form of the reciting deed.

If the parcels are to be introduced in the recitals, then, in the recital of deeds whereby a term was created, it is most convenient to insert the parcels in the recital of the deed creating the term, and selecting those parts on which the deed in preparation is intended to operate (where the former happens to be more extensive) and to advert to them, in these terms,—“Divers hereditaments, and among them and as to part thereof ALL &c., (*describing them*), All which said hereditaments and premises were then parcel of the manor of ——— therein described to be called &c.”, or in similar terms expressive of the fact.

Sometimes it is more convenient to insert the parcels in a subsequent recital, or in the operative part of the deed. The former of these plans, may be properly used, where the deed severing a farm from a manor, or a field from a close, is to be recited; the latter will be a better



plan, when the deed in preparation is to effect the severance.

Where it is intended to describe the parcels in the operative part of the deed, they may be referred to in these or the like words,—“The manors, messuages, lands &c., mentioned in the recitals of the said indentures and hereinafter described, and bearing date,” &c. Where the deed in preparation operates only on a portion of the parcels, then this fact may be noticed thus,—“the manors, messuages, &c., called —, and among them the messuages &c., hereinafter described.”

It frequently happens that the description of the parcels in modern deeds differs so materially from that in ancient deeds, that it is necessary to advert to this circumstance, which may be done in these terms,—“The manor, messuages, &c., hereinafter described, by their then names,” &c.; and then, when the parcels have to be described in the operative part, or some subsequent recital, by their modern description, they may be introduced thus,—“ALL THOSE &c., hereinbefore described in the recitals hereinbefore contained,” &c.

In long and complicated deeds, in which there are to be recitals applicable to lands held under different titles; the arrangement of the deed will be greatly simplified, by introducing the different classes of parcels under separate schedules, and then the mention of them will be by reference to the “messuages, &c., mentioned and comprised in the schedule firstly hereunto annexed,” &c. It would, indeed, be frequently almost impossible to prepare the recitals of a draft, without resorting to an expedient of this sort.

Deeds relating to land are of two descriptions; the

one comprising those which constitute the evidence of title, the other comprising those which may be said to be collateral thereto, as deeds of indemnity, &c. In the latter class of deeds it is seldom necessary, where the parcels are complicated, to mention them otherwise than by a general comprehensive description, so that the tenor of the deed may be sufficiently intelligible.

The particular description of the parcels is usually followed by what are called "general words," embracing that class of subjects which may be comprehended under the words "rights, royalties, members and appurtenances." In the recital of these words it will be sufficient to use the word "appurtenances," where the reference is to a field or close; "rights, members and appurtenances," when to a farm; and "rights, royalties, members and appurtenances," when to a manor; except only when the operation of the deed depends on the general words rather than on the particular description, and where the parcels are introduced at length into the recitals, and the deed in preparation is to operate on these parcels.

Recital of general words.

It frequently happens that there are exceptions out of the parcels, and these should of course always be noticed, either directly or by reference, in language similar to that which has been already explained with regard to the parcels, and either *verbatim*, or so much in detail as to exclude any question as to the extent of the exception. It is not uncommon to meet with the "expression except as therein is excepted," an expression which is only mentioned to be reprobated.

The clause of "And the reversion," &c., is never to be recited, except where the deed is intended to operate on a reversion or remainder, and then it is necessary.

So the clause of "All the estate" is never necessary to be recited, except where the *habendum* is repugnant to

CHAP. I.  
SEC. II.

the premises and void, for then the clause "and all the estate," &c., proves the repugnance, and is therefore an essential part of the instrument.

Recital of the  
*habendum*.

When there is only one clause of *habendum*, and all the estate conveyed is limited to one person, then it is not necessary to introduce the parcels in the recital of it, but it may be simply thus,—“To hold the same to,” &c. Where, however, there are several clauses of *habendum*, and the parcels which are comprised in them have been the subject of recital, then it will be proper to notice the parcels in the several clauses of *habendum*, in order to shew their correspondence with the recitals. When the parcels comprised within one clause of *habendum* only are the subject of recital, then the *habendum* may be recited as in a deed where there is only one such clause.

It is in the assignment of attendant terms, and in conveyances of lands, part of which are held in fee, others for life, and others for years, that several clauses of *habendum* are most commonly found; and, if there be any doubt, it will always be the safer course to take too much of the deed rather than too little.

The words which limit the estate should be given *verbatim*, except in some particular cases, as the assignment of terms, for instance, in which the effect may be substituted for the particular language of the deed, or other deeds of a like kind, which may be said to be collateral to the title, rather forming a distinct link in it.

Uses and trusts.

There is no objection to reciting the effect of those clauses of a deed, which may be as fully and clearly expressed by stating their effect, as by giving their language in detail. Thus the limitations in strict settlement, except in certain cases which from the peculiarity of the expression afford ground for observation,

or where they are to be the basis of uses to be engrafted by way of reference, may be introduced in language to the following or the like effect,—“ To the use of *A* and his heirs, till the solemnization of the intended marriage, and from and immediately thereafter to the use of *A* and his assigns for his life, with remainder to trustees and their heirs for his life, for the usual trusts of supporting contingent remainders, with remainder to the use of [*intended wife*] and her assigns for her life for her jointure and in lieu of dower, with remainder to the first and other sons of their intended marriage successively, according to their priority of birth in tail (or in “tail male,” if so, or otherwise according to the fact), with remainder to the use of the daughters of the then intended marriage as tenants in common in tail, with ultimate remainder to *A. B* in fee,” (or “with the ultimate reversion to *A. B* in fee,” if such be the fact.) This mode of reciting the limitations, embraces the full import of the language, and expresses them, and also a conclusion of law (namely, that which relates to the ultimate remainder or reversion,) in a form of words at once concise and unequivocal.

It will sometimes happen that a particular power, or certain clauses of the deed in recital, independent of the limitations, is that part of it which is material in the transaction to be recorded in the deed in preparation. For example, the transaction in question may be an exchange or partition; powers of exchange or partition may be given to the tenant for life, &c., and, consequently, in such a case, the only part of the deed which it is necessary to recite, is that which shews who is tenant for life in possession and the power of exchange, partition, &c., as the case may be.

It may be that the transaction to be effected, is authorized by a particular proviso, which is quite independent of the uses, and is given to some particular person by name. In such a case the uses may be passed over without any notice, and the proviso will be the only material recital in the draft, and must be given either at length or so fully as completely to shew the nature of its operation and the acts which it authorizes; for of course there is no occasion to introduce more of the proviso than is relevant to the title to be deduced under it. What parts of it may or may not be omitted in any given instance, will depend entirely on the particular circumstances of the case, and must be left to the discretion of the draftsman, with this general caution,—a caution that applies to every part of a deed,—that where a question arises as to whether or not a given passage of an instrument should be recited more or less closely to its language, more or less in detail, the safe practice is, to err on the side of excess rather than that of defect. One or two illustrations of this point may, however, be useful.

A term having been created many years ago for raising portions, and the trusts of the term having been performed, or having become unnecessary, on an assignment of the term it will be quite sufficient to recite the creation of the term, and refer to the trusts in this brief manner,—“ Upon divers trusts which “ have long since been performed, satisfied or discharged;” or, if such be the fact, “ which have become unnecessary,” or “ incapable of taking effect.” But if the trusts be subsisting, and are still to be acted upon, then the practice is to recite the trusts pretty fully, stating all the facts which are immediately connected

with them, and which disclose the rights of the *celles que trust* to receive the money, and give discharges, &c.

CHAP. I.  
SEC. II. •

Where the trusts are numerous and expressed at great length, and many of them have been satisfied, or become incapable of taking effect, and are no longer relevant to the title, it will, in general, be proper to pass the latter over without notice, reciting only those which still subsist and affect the title under consideration. Thus, as frequently happens in marriage or family settlements, where a term, created for raising portions, is introduced after several estates for life, or estates tail, and there is nothing which renders it material to make any reference to these preceding estates, on an assignment of the term to attend the inheritance the preceding uses may be referred to in this manner,—“To divers uses in the said indenture of release declared and limited, and which have become incapable of taking effect, remainder to the use of the said [trustees] for a term of 500 years, &c.,” or, “To divers uses limiting estates for the lives of, &c., respectively, with remainder in tail to the use of, &c., remainder to trustees for a term of 1000 years to be computed, &c.” Then stating that the term was upon divers trusts, which have been performed, or become unnecessary, or incapable of taking effect, as the case may be: in some cases, indeed, it may be judicious, though it is seldom necessary, to state the trusts shortly. In cases like these, what course may or may not be the best is a point which no general rules can prescribe, but must be left to the taste and discretion of the draftsman. Where uses are limited by reference, the deed to which reference is made should be recited fully, at least as to the uses, but not as to the powers, which are in no respect necessary to be noticed in the recital, for they

Recital when trusts have been partly fulfilled, &c.

CHAP. I.  
SEC. II.

Recital of pro-  
visos, condi-  
tions, &c.

are not actual limitations, but mere possibilities, and may never affect the title.

With respect to provisos for redemption, conditions, &c., the general rule is, that, when they are material to the title under consideration, they should be given fully, or even *totidem verbis*; but, in other cases, as briefly as is compatible with the accurate expression of their legal effect. When the intention is to give the proviso very shortly, it may be done even without any express reference to it, as "by a mortgage for securing to [*mortgagee*], his executors, &c., payment of the sum of — of lawful money, &c. with interest thereon," because the word "mortgage" necessarily implies a proviso for redemption, this clause being the peculiar characteristic of this species of deed. Where the proviso is to be given at some length, it may be introduced in these words,—“ And in the same indenture it was provided, &c. then, &c.” Where it is to be given *totidem verbis*, then thus, “ And in the indenture now in recital “ is contained a proviso or declaration in the words or to “ the tenor and effect following (that is to say), &c.” But this last mode can never be necessary, except there be some peculiarity in the wording of the proviso, or some dispute concerning the construction of it.

In reciting the proviso for redemption in a mortgage, and that the money was not paid at the given day, the expression “ that the estate thereby became absolute at law, subject only to redemption in equity,” should be used only in those cases where the effect of the proviso, both in form and from the relative situation of the parties, will be to cause the actual determination of the estate of the mortgagee. Hence, where the mortgagor has only an *equitable* estate, or the *legal* estate passes

from *his trustee*, or from a *former mortgagee*, this expression should not be used, except where a term of years is created by the legal owner, and the proviso upon the assignment of the mortgage stipulates that, upon payment to the second mortgagee, the term shall cease, for in this case the proviso operates by way of defeazance of the estate ; but such a defeazance cannot be annexed to an estate of freehold, as no one but the person from whom the legal estate passes can take advantage of a condition annexed to that estate.

CHAP. I.  
SEC. II.

Powers of sale, of leasing, for appointment of new trustees, and the other powers usually contained in settlements, trusts, deeds, &c., are never recited unless the deed in preparation is to depend on the power, and then it should be recited very fully : nor is any notice to be taken of clauses of regulation, such as those of shifting and springing uses, taking the name and arms of a family, &c. ; nor covenants, as those for title, &c., unless the deed in preparation is made in pursuance of these clauses, or for carrying the covenants into effect.

Recital of powers of sale, &c.

The following instances will sufficiently illustrate the language of recitals.

AND WHEREAS the said testator departed this life without having revoked or altered his said hereinbefore in part recited will, except by his said codicil, and without having revoked his said hereinbefore in part recited codicil.

Recital of a will, partly revoked.

AND WHEREAS the said                      and                      did mutually agree to make partition of and divide in severalty between themselves all and singular the said                      and all other the hereditaments in the said county of                      which they are now entitled to in undivided moieties, as in the said                      and hereinbefore is mentioned, and for that purpose they employed

Recitals and limitations of uses in a deed of partition.



CHAP. I.  
SEC. II.

to survey value and equally divide the same, and accordingly the said after making an accurate survey and valuation of the said divided the same into two equal allotments, one of which they entitled "First lot" and the other "Second lot," and therein they set forth the names of the messuages or tenements, and also the qualities and quantities of the land proposed to be comprised in each lot, in the manner expressed in the schedule to these presents, of all the and hereditaments agreed to be divided :

AND WHEREAS it hath been agreed between the said and that the several

and other hereditaments set forth and comprised in the division entitled "First lot" in the said schedule to these presents shall be deemed taken and accepted, as and for the share or part of the said of or in all and singular the and other hereditaments comprised in the said schedule, and agreed to be divided as aforesaid, and shall be held by the said and his heirs in severalty, and that the several and other hereditaments set forth and comprised in the division entitled "Second lot," in the said schedule to these presents shall be deemed, taken and accepted, as and for the part and share of the said of or in all and singular the said and other hereditaments comprised in the same schedule, and shall be held by the said and his heirs in severalty, &c. &c. &c.

TO HAVE AND TO HOLD the said and all other the hereditaments hereby released or intended so to be, and every part thereof, unto the said his heirs, and assigns, to the several uses, and upon and for the several intents and purposes hereinafter declared thereof, (that is to say) As to all such of the and other hereditaments hereby released or intended so to be, as are comprised or particularly set forth in the division entitled "First lot" of the said schedule to these presents, and containing in the whole, by admeasurement, acres, roods, poles, to the only use and behoof of the said his

heirs and assigns for ever, in lieu and in full satisfaction for the undivided moiety or equal half-part of him, the said

CHAP. I.  
SEC. II.

, of or in the whole of the said  
and other hereditaments hereby released or intended so to be, And as to all such of the and other hereditaments hereby released or intended so to be as are comprised or particularly set forth in the division entitled "Second lot" of the said schedule to these presents, and containing in the whole, by admeasurement, acres, roods, poles, to the only use and behoof of the said his heirs and assigns for ever, in lieu and in full satisfaction for the undivided moiety or equal half-part of him, the said of or in the whole of the said and other hereditaments hereby released or intended so to be.

AND WHEREAS in the year of the reign of his said present Majesty, an Act of Parliament was past, entitled &c., (*state the title of the act*), and the said

Recital of an allotment by way of exchange under an Inclosure Act, and of mortgage thereof to defray expenses.

was thereby appointed commissioner for carrying the said act into effect (*state the exchange clause*), AND WHEREAS at the time of passing the said act the said

was tenant for life in possession under with remainder to his first and other sons successively in tail male, and with several remainders over of and other hereditaments in AND WHEREAS the said

, in pursuance of the authority given to him by the said act, proceeded to set out and divide and allot the open fields commons and waste lands within the said

between the persons and in the manner by the said act directed, and afterwards to make and execute an award under his hand and seal, bearing date on or about the day of , specifying therein all the lands so divided, allotted and inclosed, and with such further particulars as required by the said act, two parts of which award have been duly deposited at the places and in manner thereby also required, and by such award the said set out and allotted unto the said the

CHAP. I.  
SEC. II.

in aforesaid hereinafter described and intended to be conveyed in exchange in lieu and satisfaction of such rights of common and soil belonging or incident to the said as in the said award are mentioned: AND WHEREAS for the purpose of defraying his proportion of the expenses of passing the said act and carrying the same into execution, the said did, by virtue of the said power to him thereby in that behalf given, and with the consent and approbation of the said, borrow from the said the sum of £—— at interest, upon the security of the allotted to him, as aforesaid, and comprised in the next recited indenture, such sum not exceeding £—— for every acre of such allotment, and accordingly by an indenture bearing date on or about the day of and made or expressed to be made between &c., in consideration of the sum of £—— paid to the said by the said by the direction and appointment of the said the said did, by virtue of the power to him in that behalf given by the said act, and with the consent and approbation of the said signified by writing under his hand and seal, bargain, sell and demise unto the said his executors, administrators and assigns, all and singular the in aforesaid, so allotted to the said and therein and hereinafter described and intended to be conveyed in exchange, TO HOLD the same unto the said his executors, administrators and assigns, from thenceforth, for the term of years, subject to a proviso and agreement therein contained, for determining the said term on payment by the person or persons for the time being entitled to the said to the said his executors, administrators or assigns, of the said sum of £—— with interest at 5 per cent. per ann. on the day of next.

Recital of AND WHEREAS the said has since departed trustee being this life intestate as to the trust-estate or interest limited to an infant, with him by the said indenture of release, of or in the said covenant to ob-

therein comprised and leaving now an CHAP. I.  
SEC. II.  
infant of the age of        years or thereabouts, his son tain conveyance  
and heir at law, him surviving, to whom the same trust estate from him at 21  
or interest hath descended at law; AND WHEREAS the said years.

hath contracted and agreed with the said  
for the absolute purchase of the said and pre-  
mises, at or for the price or sum of £—— and he, the said  
instead of requiring a conveyance from the  
said of his said trust-estate or interest, under  
an order of the Court of Chancery as an infant trustee, hath  
agreed to accept such covenant of the said for  
obtaining a conveyance thereof when the said  
or his heirs shall be competent so to do, as is hereinafter in  
that behalf contained (1).

AND WHEREAS by an order of the High Court of Chan- Recital of pro-  
cery, dated the        day of        last past, on the petition ceedings for  
of the said       , it was referred to Mr.        obtaining an  
one of the masters of the said court, to examine and certify order for in-  
how the said        was interested in the said        fant trustee  
and whether he was an infant and a trustee within the mean- to convey.  
ing of the Act of Parliament made in the sixth year of the  
reign of his present Majesty, entituled “ An Act for con-  
solidating and amending the laws relating to conveyances,  
and transfers of estates, and funds, vested in trustees, who  
are infants, &c.” and for whom, and, in pursuance of such  
order, the said master made his report, dated the        day of  
last past, and thereby certified that the said  
was an infant trustee of the said        within the intent  
and meaning of such act, and that he was such infant trustee  
for the benefit of the said       ; AND WHEREAS, by a  
subsequent order of the said court, dated the        day of  
last past, the said report was confirmed, and it was  
ordered that the said        should, pursuant to the  
said act, convey the said        and other hereditaments  
unto the said       , or as he should direct.

AND WHEREAS the said       , pursuant to the trusts Recital of a  
(1) For the covenant see postea “covenants.” sale by a trustee.

CHAP. I.  
SEC. II.

reposed in them by the said recited , and with the privity and concurrence of the said lately contracted and agreed with the said for the absolute sale to him in fee simple in possession of , at or for the price or sum of £——

Recital (short of uses in a marriage settlement.

To hold the same unto the said , their heirs and assigns, to the uses upon and for the trusts intents and purposes, and with and subject to the powers and provisoes therein declared and contained of and concerning the same, to take effect after the said then intended marriage, for the several benefits of the said and his then intended wife, and their issue, in a course of strict settlement :

Recital of descent of trust estates to the heir of the trustee, with the latter's intestacy.

AND WHEREAS the said departed this life in or about the year 18 , without having, by will or otherwise, disposed of the said , which so became vested in him at law, but in trust as , leaving the said his and heir at law, whom the said and hereditaments thereupon descended to, and are now vested in, but in trust as aforesaid.

Recital of death of mortgagee in fee, and descent of the estate to his heirs.

AND WHEREAS the said died on or about the year 18 , having in his life made and duly published his last will and testament in writing bearing date on or about the day of 18 and thereby appointed the said executors of the same, but the said did not thereby or otherwise dispose of the estate of inheritance at law, which by the last recited indenture was conveyed to him, of or in the said therein comprised, and the said left the beforenamed , then and still an infant under the age of 21 years, his only son and heir-at-law, to whom the said thereupon descended at law, but by way of mortgage only for securing the said sum of £—— and interest to the said , as the personal representatives of the said ; AND WHEREAS, upon the death of the said , the said duly proved the said will in the court of

CHAP. I.  
SEC. II.

**Recital of a provisional agreement, subject to the approbation of and confirmation by a vestry.**

**D**

CHAP. I.  
SECT. II

and there unanimously resolved that the said agreement should be confirmed and carried into effect, as appears by a resolution of the said vestry, dated the same day, and written in the book kept for entering the proceedings of the vestry meetings of the said parish.

Recital of limited letters of administration.

AND WHEREAS there is now no general personal representative of the said                      AND WHEREAS the Court of                      hath granted unto the said letters of administration, bearing date on or about the day of                      , of the personal estate and effects of the said                      , left unadministered by the said                      , limited so far as respects the                      and other premises comprised in the said term of                      years in trust as aforesaid.

Recital of letters of administration *de bonis non*.

AND WHEREAS the                      Court of                      hath granted letters of administration, bearing date on or about the                      day of                      , of the personal estate and effects of the said                      , unadministered by the said                      unto the said                      , who is thereby become at law entitled to the said                      and other premises for the residue of the said term of                      years, But in trust as aforesaid.

Recital of proceedings in the Court of Chancery for establishing a will.

AND WHEREAS, in or about                      term, 18                      , a suit was instituted in the High Court of Chancery, in which the said                      and others were plaintiffs, and the said                      and others defendants, for establishing the said will and codicil of the said testator,                      , and carrying the trusts thereof into execution, and taking the necessary accounts therein, All which was decreed and directed by the said court.

Recital of deed and recovery whereby estates stand limited to particular uses.

AND WHEREAS, by indentures of lease and release, &c. &c., And by virtue of a common recovery, with double voucher suffered pursuant thereto, before the Justices of His Majesty's Court of Common Pleas, at Westminster, in term, 18                      wherein the said                      was vouched,

All, &c. therein and hereinafter particularly described, and intended to be hereinafter limited and assured To the use of , were

CHAP. I.  
SEC. II.

AND WHEREAS, by indentures of lease and release, bearing date respectively on or about the and days of

18 , the release being made, or expressed to be made, between, &c., And by virtue of a fine *sur connuance de droit come ceo*, &c., acknowledged and levied by the said and , his wife, unto the said , and his heirs, before the justices of the Court of Common Pleas, at Westminster, in or as of term, 18 whereupon proclamations were afterwards duly made, All, &c. were and stand limited, and assured, (*recite the uses to which they were conveyed.*)

WHEREAS the said is seised of, or well and sufficiently entitled to, such parts of the messuages or tenements, lands, and other hereditaments hereinafter particularly mentioned, as are of freehold tenure, with their appurtenances, for an estate of inheritance in possession, and is seised of, or well and sufficiently entitled to, such part thereof as is of copyhold tenure, for an indefeasible estate of inheritance in possession, to him and his heirs, according to the customs of the several manors whereof the same respectively are part.

Recital for a conveyance and covenant to surrender where the copyhold and freehold parts are not sufficiently distinguished.

AND WHEREAS the said suit and proceedings having become abated as aforesaid, the said filed his

Recital of a bill of revivor.

bill of revivor in the said court against the said and his wife, and the said by his guardian and the same was duly revived by order of the court; And whereas, in pursuance of the said decree, the said [master] made his report, bearing date, &c., which has since been duly confirmed, and thereby certified that (*insert report*); AND WHEREAS, by a decree pronounced in said cause by the honourable the Master of the Rolls, on the &c., it was ordered that (*here insert the decree on the bill of revivor*).



## CHAP. I.

## SEC. II.

Recital of deed  
to make a  
tenant to the  
*præcipe* and  
the subsequent  
recovery.

AND WHEREAS, by indenture of lease and release, bearing, &c. the release being made, or, &c. between, &c. AND WHEREAS, by a common recovery duly had and suffered before his Majesty's justices of the Court of Common Pleas, at Westminster, in Hilary term, in the                      year of his present Majesty's reign, in pursuance of a covenant contained in the said indenture of release, in which recovery the said                      and                      his wife were vouched and vouched over the common vouchee of the said Court of Common Pleas ; and, by force of a declaration of the uses of the said recovery in the said indenture of release contained, the estate in tail male, to which the said                      became entitled in remainder, immediately expectant on the determination of the said term of 500 years thereby created, by virtue of the said hereinbefore in part recited indentures of, &c. of certain the said messuages, lands, and other hereditaments therein comprised, and all remainders, reversions, and limitations, expectant or depending on the said estate tail, were docked, barred, defeated and destroyed ; and the said last-mentioned messuages, lands, &c., with their appurtenances, were (subject to the aforesaid term of 500 years, limited and created by the said indenture of release of the, &c. and the portions thereby received to be paid to the younger brothers and sisters of him, the said                      or such part or parts thereof as was or were then remaining due or payable) conveyed, limited and assured to the use of the said                      his heirs and assigns, for ever.

Recital of consent of *cestui que trust* to contract for purchase and raising the consideration by sale of stock.

AND WHEREAS the said [*trustees*] have contracted for purchase of said lands, by their agent as aforesaid, by and with the approbation of the said [*celles que trust*] testified by writing under their hands and seals, and they, the said [*trustees*], have this day, by and with such consent and approbation, and so testified as aforesaid, by sale of the whole of the said sum of £——, 5 *per cent.* navy annuities, and of £—— part of the said sum of 3 *per cent.* consols, bank annuities, &c.

AND WHEREAS, under and by virtue of an Act of Parliament made, &c., intituled "an Act for dividing and enclosing," &c., one piece or parcel of land in the fields, containing        acres, was, among and together with other hereditaments, set out and allotted to the said        in lieu of his property in the said fields, to which he became entitled by the lastly hereinbefore in part recited indentures.

CHAP. I.  
SEC. II.  
—of Inclosure  
Act, and contract for sale of  
all vendor's estates in the parish.

AND WHEREAS the said        is seised of, and well and sufficiently entitled to, several plots, pieces or parcels of land lying intermixed with the said manor and other hereditaments, but not comprised in the several hereinbefore in part recited indentures or any of them, for an estate of inheritance in fee simple in possession, free from all incumbrances.

AND WHEREAS, under or by virtue of an Act of Parliament, made and passed in the        year of his present Majesty's reign, intituled "an act for enclosing" &c., parts of the lands and other hereditaments comprised in the several hereinbefore in part recited indentures, and of which the said        became seised in fee as aforesaid, were allotted awarded and given in exchange to some other person or persons, and divers lands and other hereditaments were allotted, awarded or given in exchange to the said        in lieu of the lands and other hereditaments allotted, awarded or given to some other person or persons as aforesaid.

AND WHEREAS the said        has contracted and agreed with and to the said        for the absolute sale to him, the said        of the said manor and advowson, and such of the lands and other hereditaments comprised in the several hereinbefore in part recited indentures, and of which he became seised in fee before the said inclosure, as were not allotted awarded or given in exchange to any other person or persons; and also of the lands and other hereditaments awarded, allotted or given in exchange to him by the said act, and of the said pieces or parcels of of which he became seised in fee subsequently to the said

CHAP. I.  
SEC. II.

inclosure act, and of all and singular other the hereditaments hereinafter mentioned, and intended to be hereby granted and released, with their and every of their appurtenances free from incumbrances, except the land tax and several subsisting taxes, &c., all for the price or sum of £——.

—of agreement  
for splitting the  
consideration  
money.

AND WHEREAS, for the purposes of the stamp duty act, it hath been agreed that the said sum of £——, the purchase-money aforesaid should be split into two parts, and that the sum of £——, part thereof, shall be the consideration for the freehold, and the sum of £——, residue thereof, the consideration for the copyhold.

—of the invest-  
ment of a sum  
of money in  
stock.  
(Form 1.)

AND WHEREAS, in pursuance and part performance of the said agreement on the part of the said , he, the said , hath this day laid out and invested the sum of £ of lawful money current in England, in the purchase, in the names of the said of £—— three *per cent.* consols bank annuities, and the said sum of £—— three *per cent.* &c. is now standing in the names of the said in the books of the Governor and Co. of the bank of England, as they, the said , do hereby admit and acknowledge.

(Form 2.)

AND WHEREAS, in pursuance of the said agreement, they, the said *A.* and *B.* respectively, have this day transferred the said respective sums of £ three *per cent.* consols bank annuities, and £ four *per cent.* bank annuities, unto the said *C.* and *D.* and the same sums respectively are now standing in their joint names, in the books of the Governor and Co. of the bank of England, as they, the said *C.* and *D.*, do hereby admit and acknowledge.

Recital that  
parties join in  
conveyance  
for the purpose  
of strengthen-  
ing the title.

AND WHEREAS it hath been agreed that the said should join in the conveyance intended to be hereby made, and in the fine hereinafter covenanted to be levied of the said hereditaments for the purpose of strengthening the title to the same, and for conveying and releasing all the right, title and interest of dower, jointure or otherwise, of them, the said , and each and every of them of, in,

to, from and out of, or upon the same hereditaments, and every or any part thereof; And it hath also been agreed that the said                      should enter into the covenants hereinafter on their parts contained.

CHAP. I.  
SFC II.

WHEREAS his most excellent Majesty King George the Fourth, by his letters patent under the great seal of Great Britain, (1) bearing date on or about the                      day of

Recital of a  
patent.  
Form 1.

in the year 18    , did give and grant unto the said [patentee], his executors, administrators and assigns, full power, sole privilege and authority, to make, use, exercise and vend the therein mentioned invention of the said [patentee] of certain improvements in [steam-engines] within that part of the United Kingdom of Great Britain and Ireland, called "England," (2) the dominion of Wales, and the town of Berwick-upon-Tweed, (3) for the term of fourteen years from the day of the date of the said letters patent, but subject to the usual provisoes for making void the said letters patent, in case a specification of the said letters patent therein mentioned should not be duly enrolled within six months therefrom, or the said letters patent or the beneficial interest therein should at any time thereafter be assigned to or otherwise become vested in more than five persons.

AND WHEREAS the said [patentee] hath lately obtained his his Majesty's royal letters patent, bearing date the                      day of                      in the year 18    , for his sole and exclusive use, benefit and advantage, for and during the term of fourteen years, to be computed from the day of the date of the said letters patent, of certain inventions and improvements lately made and discovered by the said [patentee] in the manufacture of machinery [for printing silk].

(1) Or, "under the great seal for Ireland," or "Scotland," if the patent be for Ireland, or Scotland.

(2) Or "Ireland," or "Scotland," if it be so.

(3) "And also within all his Majesty's colonies and plantations abroad" if so.

CHAP. I.  
SECT. III.

Recital of a  
fine.

As a fine or recovery operates as a conveyance, it is sufficient, in reciting it, to say that, by the fine or recovery, the lands were "conveyed" to the conuzee or recoveror, but if no notice is taken of the conuzee or recoveror, then it will be right to say that, by the fine or recovery, the lands were "limited" to the uses declared, &c., for the word "limit" has reference rather to the uses declared than to the conveyance. It would therefore be incorrect to say "that by indentures of lease and release, &c., lands were 'limited' to A and his heirs, to the use of B and his heirs." The recital should be either "that by indentures of lease and release," &c., "lands were conveyed to A and his heirs, to the use of B and his heirs," or, "that by indenture, &c., lands were 'limited' to the use of B and his heirs."

Recital of the  
effect of a deed.

In reciting the effect of a deed, the words "convey and assure" are more accurate than "grant, release and convey," inasmuch as the latter have reference to a particular mode of assurance, whereas the former are perfectly general and express the effect of the deed whatever be the mode of its operation.

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### SECTION III.

#### *Of the Witnessing Clauses.*

Of the consid-  
eration.

The consideration of a deed should be fully stated, and where it is very complicated and consists of several particulars, it seems to be a better way to state it by way of recital, and then it may be referred to in the

witnessing part in terms to this effect:—"NOW THIS  
 "INDENTURE WITNESSETH, that in pursuance and  
 "performance of the said agreement, and for the  
 "considerations hereinbefore expressed, &c." The ex-  
 pression, "and for divers good causes and considera-  
 "tions," should not be added, unless there be considera-  
 tions besides those expressed.

CHAP. I.  
 SECT. III.

Care should be taken to use operative words proper <sup>Operative words.</sup> for expressing the peculiar operation of the deed. In the common conveyance by lease and release, the proper operative words for the former are, "bargain and sell," and for the latter, "release;" but, besides these words, which express the mode in which these two instruments respectively operate, it is the practice to insert several others, which might support the deed, if, through any mistake or accident, it should fail of its intended effect,—as "grant, bargain, sell, alien and release." Where the conveyance is by trustee and the owner, the trustee "bargains, sells, aliens and releases," and the owner "grants, bargains, sells, aliens, releases and confirms," and a similar practice prevails where the conveyance is by mortgagee and mortgagor, and in other like cases. In the transfer of a mortgage in fee, the proper words are "grant and release;" in the assignment of an annuity the word "grant" is essential. In a re-conveyance by a mortgagee, the operative words are usually qualified in these terms "grant, bargain, sell, alien and release, by way of covenant only, and not by way of warranty," or without any qualification, using only the words "bargain, sell and release." There is also, in a transaction of this kind, a further witnessing part, by which the mort-

CHAP. I.  
SEC. VII.

gagagee discharges the land from the mortgage-money, and in which the operative words are "remise, release and for ever quit claim." When an estate is sold subject to annuities in parcels, the annuitants should not "grant, bargain, sell and release," but "grant, remise and release."

Parcels.

In describing the parcels, three things must be attended to:—1st.—That the description be sufficiently comprehensive to comprise all the lands; 2nd,—That it be sufficiently descriptive to ascertain them; 3rd,—That the description in the deed now preparing, be so connected with the description in the former deeds, as to show the identity of the lands throughout the title.

Habendum.

Where an estate is conveyed, subject to incumbrances, these should be excepted in the *habendum*. An *habendum* seems to be unnecessary, and ought not to be inserted in the conveyance of a term or rent-charge, which is conveyed to a grantee for the purpose of being merged. In the assignment of personalty or *choses in action*, the *habendum* should be accompanied by a short power of attorney as in the following form,—

Habendum of  
Personalty.  
with short  
Power of At-  
torney.

And all the right, title, interest, trust, property, benefit, claim and demand whatsoever of the said \_\_\_\_\_ in, to, and upon, the same premises, together with full power and authority, (which the said \_\_\_\_\_ doth hereby give and grant to and for the said \_\_\_\_\_ executors, administrators and assigns), in the name of the said \_\_\_\_\_, to ask, demand, sue for, recover, receive, sign and give full and absolute acquittances and discharges in writing, as well for, as from the application of the \_\_\_\_\_, and other premises hereby assigned, or intended so to be, as and when the same shall become payable, To HAVE, hold, receive and take the \_\_\_\_\_, and other premises hereby

assigned, and every part thereof, unto the said  
 his executors, administrators and assigns, from henceforth,  
 as fully and effectually as the said , his execu-  
 tors or administrators, could, or might have otherwise had,  
 or been entitled to the same.

CHAP. I.  
 SEC. III.

When a conveyance is to be made to uses, care should  
 be taken to avoid the common mode of releasing the  
 lands to the use of the releasee and his heirs, for when  
 the uses are limited in this manner, the legal estate will  
 vest in him, and all the subsequent uses will be mere  
 trusts and not executed under the Statute of Uses.

Conveyance  
 to Uses.

When the first estate of freehold is limited by way  
 of resulting use, all the ulterior limitations must be  
 future and executory, till an estate of freehold becomes  
 vested, and, in the mean time, the fee remains vested in  
 the former owner by way of resulting use.

In all well drawn settlements, there is a proviso for  
 the *cesser* of the terms created thereby, when the trusts  
 of them have been fulfilled, or become unnecessary or,  
 incapable of taking effect: with such a proviso, the  
 term would cease on any one of these events taking  
 place. It will sometimes be found, however, espe-  
 cially in settlements, that the proviso is in a different  
 form. The term, we will suppose, was created for  
 raising portions, and the proviso is in this form,—“ that  
 “on the payment of the portions, the term shall cease  
 “or be surrendered or assigned to, &c.” In this case, the  
 term, after the performance of the trusts, has a continuing  
 legal existence, and until it be merged must be assigned  
 to attend the inheritance. Thus by the marriage settle-  
 ment of A. B in 1709, a term of five hundred years was  
 limited (immediately after estates for life to him and his  
 wife) to trustees, for raising portions for daughters in



CHAP. I.  
SEC. III.

case of no issue male of the marriage, and after limitations to the first and other sons of *A. B* in tail male, and a limitation to *C. D* (his younger brother) for life, a term of six hundred years was limited to the same trustees in trust, in case *A. B* should have a younger son or sons, or a daughter or daughters, to raise portions for them. Then followed a limitation to the first and other sons of *C. D* in tail male, remainders over; and in the settlement was contained a proviso, that when the portions provided under the two respective terms should be paid &c., or in case they should not become raisable, the terms should be surrendered or be assigned to attend the inheritance. *A. B* had one son who lived to the age of twenty-five, but died in his father's lifetime, without having suffered a recovery; in this case, the trusts of the first term could not arise, there being issue male of the marriage; but the trusts of the second term did arise, as that term was not, as it might have been, barred by a recovery suffered by the son of *A. B*. Both terms, however, the first as well as the second, having had a legal existence under the limitations of the settlement and the proviso directing, not that they should cease on payment of the portions, or on their trusts becoming unnecessary (as would have been proper), but that they should be assigned or surrendered,—an actual assignment or surrender was necessary from the representative of the surviving trustee.

Terms.

When a term is vested in trustees, and the survivor of them, and the executors and administrators of such survivor, and the survivor of the trustees cannot be ascertained, administration should be taken of the effects of all the trustees, and the administrators should join in making an assignment of the term.

It is always desirable to keep the title of an estate as free as possible from unnecessary terms, and, therefore, when there are several trust-terms, they should all be merged except the oldest, unless, from the loss of deeds, or some other peculiar circumstance, it should happen that a more modern term will be a better protection. Where a term has been regularly assigned to attend the inheritance it is no incumbrance, and therefore ought not to be excepted in the conveyance of the inheritance, because a plaintiff on any demise by the owner would be nonsuited, as the very deed under which he would be seeking to recover would shew the legal estate to be outstanding in the trustee of the term. Where a lessee purchases the reversion, his term becomes merged, and this should be stated in the deed, with a declaration that, if there be any subsisting terms which comprise the estate or any part of it, the same shall be in trust to attend.

CHAP. I.  
SEC. III.  
Merger of  
terms.

Terms generally follow the *habendum*, but if any clauses be annexed to the limitations themselves, as clauses for shifting the estate, or the *cesser* of another estate, or to compel the parties to take a particular name, these clauses should precede the term.

When terms are to be created in a marriage settlement, and the sons of the marriage are to be tenants in tail, and portions are to be raised for daughters, and other sums raised for parents, if the sons are to be liable to pay those sums and other charges, the term should be limited antecedently to the estate tail, that it may not be affected by the recovery of the son; but if the portions, &c., are to be raised only in the event of the estate tail not vesting, or having vested, of its determination, then the term should always be limited subse-

Terms in marriage settlement.

CHAP. I.  
SEC. III.

quent to the estate tail, that when the tenants in tail suffer a recovery, they may bar the term.

It ought to be observed, however, that if a term were inserted by mistake after an estate tail, and barred by the recoveries of tenant in tail, a court of equity would relieve.

The terms for securing the jointure and raising the portions should always be vested in distinct sets of trustees, that there may be no merger of the terms nor any question raised on that point.

Where the estate is small, the whole fee should be vested in trustees upon such trusts as will carry the agreement of the parties into execution. Care, however, should always be taken not to limit the legal estate in fee to any person who may be a *cestui que trust* in tail under the trusts declared of their estate.

When a term is limited to secure an annuity, and it is declared that after the annuity is satisfied or released that the term shall cease if the owner of the inheritance wish to keep the term on foot, he may release the condition and get the term assigned to a trustee for him.

Assignment of terms.

Though the legal estate be in the termor, yet, where the settlement is voluntary, a subsequent demise may be considered as passing the legal estate, and such term should therefore be assigned to attend the inheritance and not surrendered as a mere equitable interest.

Terms to support &c.

When the lands are the husband's, the limitation to trustees is generally added immediately after the husband's life estate, but when the wife's lands are settled it is very necessary that there should be a limitation to trustees for both their lives: the reason why this difference ought to be made is this, that the wife, by statute, is restrained from divesting the freehold which she

hath of the gift of her husband, but when her own lands are settled she may destroy the contingent remainders after the death of her husband, unless an estate of inheritance was interposed to prevent it. The limitation to trustees should always be for the lives of the persons who are tenants for life, and when the husband and wife are tenants for life, one limitation to trustees for both their lives will answer every purpose.

CHAP. I.  
SEC. IV.

Where the settlement has a general and unlimited power of appointment, and the trusts to take effect in default of appointment are of such a nature that they must be performed on the death of the settlor, there is no necessity for a power to change trustees. By appointing the property to new trusts, the settlor will effectually impose on the old trustees the necessity of transferring it.

Power to appoint new trustees.

## SECTION IV.

### *Of the Declarations.*

Conveyances are either for the benefit of the grantee, or they are upon trust for some given object, as for the benefit of creditors, for the purpose of securing money, for the purposes of settlement &c., and, in such cases, the operative part of the deed is followed by a statement of the uses for which it is made, which is technically called the declaration of the trusts, except in certain cases in which it is found to be more convenient to declare these trusts by a separate deed, as, for instance, on a purchase where the conveyance is made to one person,

CHAP. I.  
SEC. IV.

the purchase-money being actually advanced by another person, whose name, for some reason or other, it is desirable to keep out of the principal deed. Thus on the sale of a bankrupt's property, the solicitor to the commission cannot purchase, without an application to the Court of Chancery for leave so to do, which order the court will not make without the consent of all the parties interested. It may happen, nevertheless, though this consent cannot be had, that it would be very proper and advantageous to the estate for the solicitor to purchase, and in such a case the conveyance must be made to some friend of the solicitor, who ought, by a deed of even date, to execute a declaration that he only purchased in trust for the party actually advancing the money.

The following forms will shew the mode of introducing declarations into a deed.

Declaration of uses, commencement of, where the conveyance is both by appointment and release. AND it is hereby agreed and declared, between and by the parties hereto, that as well the direction and appointment as also the grant and release hereinbefore contained, shall severally operate and And all and singular the and other hereditaments hereby appointed and released, or intended so to be, shall from henceforth go and remain,

Declaration of uses or trust, commencement of. AND it is hereby agreed and declared, between and by the parties hereto, that the said heirs, executors, administrators and assigns, shall stand and be possessed and seised of and interested in the and other hereby or intended so to be, and every part thereof, to the uses, upon and for the trusts, intents and purposes, and with and subject to the powers and provisoes hereinafter declared and contained, of and concerning the same (that is to say),

AND lastly, the said doth hereby testify and declare, that the said annuity or yearly rent-charge of £—— hereby granted and so secured to him as aforesaid, is so granted and secured, and hath been purchased for and on behalf of the said Norwich Union Life Insurance Society “and that the said sum of £—— now paid by him in manner aforesaid, as the consideration for granting the same, is the proper money of the said society” (1) and that he, the said his heirs, executors, administrators and assigns (respectively), shall and will stand and be possessed (and seised respectively) of and interested in the said annuity or yearly rent-charge with the securities for the same and the money to be paid for any re-purchase thereof under the said proviso authorizing the same, In trust for the same society, as part of their capital or joint stock.

CHAP. I.  
SEC. IV.

Declaration  
that grantee of  
an annuity is a  
trustee for the  
Norwich  
Union Society.

UPON TRUST, in case, and when and as often as the said rector and parish church shall become vacant by the death, cession, resignation or deprivation of the present or any future incumbent thereof, at any time or times after before the said shall have taken priest's orders, or be otherwise by law capable of holding the said living, to present to the same some fit and proper person, in the discretion of the said or the survivor of them, their or his executors, administrators or assigns, and to do all necessary acts for rendering the same person the rector thereof, every such person giving his bond in a suitable penalty, or some other sufficient security, to resign the said rector and parish church when thereto requested by the said or the survivor of them, their or his executors, administrators or assigns, by notice in writing for that purpose; And when and as soon as the said shall have taken priest's orders and be otherwise capable to hold the said living, upon trust to re-

(1) The words in inverted commas are to be omitted here if stated before in the deed.

CHAP. I.  
SEC. IV.

quire and cause such person so by them, or him, presented to resign and vacate the same, pursuant to such bond or other security for resignation as aforesaid, and Upon further trust thereupon, to present the said to the said rectory and living, and to do all necessary acts for rendering him the rector thereof.

Trust of yearly  
payment for  
*feme covert*  
by reference.

Do and shall, during the life of the said pay the unto her, the said, her appointee and appointees, for her own sole and separate benefit, free from the debts and control of her said husband, with such and the same power to give receipts in writing for the same, and under such and the same restrictions against assigning, charging or otherwise anticipating, and in such and the same manner in all respects as are hereinbefore declared and contained with respect to the said annuity of £——

Trustees declaration that clauses for appointment, indemnity, &c., of, shall be applicable to other deeds.

AND it is hereby lastly provided, agreed and declared, that all and singular the clauses, provisoes and agreements in the last mentioned indenture contained for appointment of a new trustee or trustees from time to time, in any of the events therein mentioned, and for the indemnity and reimbursement of the trustee or trustees for the time being, shall take effect in and be applicable to the said and the stocks, funds or securities, in or upon which the same shall be invested, and the dividends or interest and annual produce thereof, and the trustee or trustees for the time being thereof, in such and the same manner in all respects, as if the same were herein expressed and repeated.

Trustees, declaration in articles for clauses for the appointment and indemnity of.

AND it is hereby lastly agreed, that in such settlement, there shall be inserted a proper clause for the appointment of new trustees, or a new trustee, in the stead or place of any trustees or trustee, for the time being, acting under any

of the trusts hereinbefore expressed, who shall die, or shall go to reside beyond the seas, or be desirous of being discharged from or decline, or become incapable to act in the aforesaid trusts, before the same shall be fully executed or at an end, every such appointment to be made by the said and his intended wife, and the survivor of them during their, his and her lives and life, and after the decease of the survivor of them, then by the guardian of any infant child or children, or other issue of the said intended marriage, who shall be interested in the several trust-estates, monies and premises, or any part thereof, under any of the several trusts and powers aforesaid, but if there shall be no such guardian, then by the surviving or continuing trustee, if any, but if not, then by the executors or administrators of the last trustee, and also proper clauses for the indemnity and re-imbursement of the trustees or trustee for the time being.

PROVIDED ALWAYS, &c. that it shall and may be lawful, to and for the said [*trustees*], with the consent, in writing, of the said [*wife*], to lend and advance to the said [*husband*], all or any part of the premises hereinbefore assigned or &c. upon any personal or other security of the said [*husband*], as to them, the said [*trustees*] shall seem proper, and from time to time, at the request, in writing, of the said [*wife*], to call in the same, or any part thereof, and if they or he shall think proper, and with such consent as aforesaid, to lend and advance the same, or any part thereof, again, to the said [*husband*], upon such security as aforesaid, without being in any wise responsible for the repayment, or answerable or accountable for any loss, which shall or may happen, or be sustained, by or in consequence of any such loans or advancement as aforesaid.

AND upon every such sale or exchange "to convey or cause to be conveyed," (1) the hereditaments which shall be

(1) If part be copyhold say "convey or surrender, or cause to be conveyed or surrendered respectively."

Power to trustees, with consent of wife, to lend trust-monies to husband on his personal security, and to call in the same and lend to him again from time to time.

Power of sale, and exchange, alteration in where the legal estate is vested in the trustees.



CHAP. I.  
SEC. IV.

sold and exchanged (1) unto and to the use of the purchaser and purchasers, or the person or persons taking the same in exchange, his, her or their heirs and assigns forever, or to such other person or persons, and in such manner as he, she or they shall order and direct, freed and discharged of and from all and singular the trusts, intents and purposes hereinbefore declared and contained thereof.

Power, general,  
of charging  
lands.

PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to these presents, that it shall and may be lawful, to and for the said , at any time or times after , by any deed or deeds, writing or writings, with or without power of revocation, to be by him sealed and delivered in the presence of and attested by two or more witnesses, or by his last will and testament in writing, or any codicil or codicils thereto, to be by him signed and published in the presence of and attested by three or more witnesses, to subject all or any of the several , and other hereditaments hereby

, or intended so to be, to and with the payment of any sum or sums of money, not exceeding in the whole the sum of £— of lawful money current in England, to be paid to him, the said , or to such other person or persons, and for such intents and purposes as he shall think proper; and shall, by such deed or deeds, writing or writings, or such last will and testament, or codicil or codicils aforesaid, order and direct; and that, for the purpose of raising such sum or sums of money, It shall and may be lawful, to and for the said , by the same or any other deed or deeds, writing or writings, or such last will and testament, or codicil or codicils, so to be signed and published, and so also to be attested, as aforesaid, to limit or create any term or terms of years to be made redeemable, or to cease, on full payment of the sum or sums of money so to be charged, and the interest thereof, and the costs and

(1) If power of partition is incorporated in it, add "or divided," and after "exchange," add "or partition."

expenses attending the same, by the person or persons who, for the time being, shall be entitled to the next estate of freehold or inheritance, in the premises so to be demised or charged as aforesaid.

CHAP. I.  
SEC. IV.

PROVIDED ALWAYS, and it is hereby lastly agreed and declared, between and by the parties hereto, that it shall and may be lawful for the said \_\_\_\_\_, his heirs, executors, administrators or assigns, at any time or times while the said sum of £——, or any part thereof, shall remain on the present security, absolutely to sell and dispose of the \_\_\_\_\_ and other hereditaments hereinbefore released, or intended so to be, and thereupon, and on every such sale, the said \_\_\_\_\_, his heirs or assigns, shall and will “join and concur in the release or releases of the hereditaments to be so sold unto the purchaser or respective purchasers thereof, and the said \_\_\_\_\_, his heirs and assigns, shall have and receive, in reduction and towards discharge of the said principal sum of £——, or so much thereof as may then remain unpaid, such part or proportion of the purchase-money or monies of the hereditaments to be sold, as the same hereditaments shall bear in worth or value to the whole of the hereditaments hereby released, anything hereinbefore contained to the contrary notwithstanding.”

Power for mortgagor to sell any part of the estates mortgaged, a proportional part of purchase-money being paid in reduction of the mortgage.

If the mortgage be for a term, instead of the words in inverted commas, use these following:—

“Assign, surrender or otherwise dispose of the \_\_\_\_\_ and premises so to be sold, and every part thereof, for all the then residue of the said term of \_\_\_\_\_ years, hereby created, in such manner, and for such purposes as the purchaser and respective purchasers thereof, his or their heirs and assigns, shall order and direct; and they, the said \_\_\_\_\_, or the survivor of them, his executors, administrators or assigns, shall receive and take the purchase-money or monies of the \_\_\_\_\_ and \_\_\_\_\_

Variation when the mortgage is for a term.

CHAP. I.  
SECT. IV.

"hereditaments so to be sold, in reduction, and towards discharge of the said principal sum of £——, or so much thereof as may then remain unpaid, and the interest thereof, and the , and hereditaments which shall then remain unsold, shall, from thenceforth be, and continue a security for so much of the said principal sum as shall then remain due, and the interest thereof, any thing hereinbefore contained to the contrary notwithstanding."

Power for the mortgagor to pay off any part of the debt before the day appointed, by way of instalments, of not less than a certain sum.

PROVIDED ALSO, and it is hereby further agreed and declared, between and by the parties hereto, that it shall and may be lawful for the said , his heirs, executors, administrators and assigns, if he or they shall be so desirous, to pay off and discharge unto the said

executors, administrators or assigns, the said mortgage debt or principal sum of £——, or any part or parts thereof, either in one payment, or by instalments of not less than £—— each, at any time or times before the said day of , on giving to the said

executors, administrators and assigns, calendar months' previous notice in writing of such the desire of him, the said heirs, executors, administrators or assigns; and thereupon, and on full payment on or at the day or time, or days or times to be appointed in such notice, or notices respectively, of the said sum of £——, and all interest and arrears of interest thereof, together with all costs and expenses, (if any), to be occasioned by any non-payment of such interest, the said term of years hereby created, shall cease and be utterly void, in such or the like manner as if the said sum and interest had been duly discharged under the proviso and agreement for redemption first hereinbefore contained, but without prejudice to any other part of these premises or the limitations hereinbefore contained.

Proviso in an PROVIDED ALWAYS, and it is hereby lastly agreed and

declared, between and by the parties hereto, that if either of them, the said , and , his heirs or assigns, shall, at any time hereafter, be lawfully evicted or dispossessed of or from the , and hereditaments hereinbefore respectively conveyed to him in exchange, or intended so to be, as aforesaid, or any part thereof, then, and in such case, it shall and may be lawful to and for such of them the said , or their respective heirs or assigns, who shall be so evicted or dispossessed, as aforesaid, to enter into and upon the , and hereditaments hereinbefore conveyed in exchange, or intended so to be, by him, who or whose heirs or assigns shall suffer such eviction or dispossession, and the same to have again, repossess and enjoy, in or as of his or their first and former estate, anything herein, &c.

CHAP. I.  
SECT. IV.

exchange-deed  
for re-entry,  
in case of  
eviction.

PROVIDED ALWAYS, and it is hereby agreed and declared between, &c. that, as between the said , his executors, administrators and assigns, and the said , their several executors, administrators and assigns, the whole of the said yearly rent or sum of £—, shall be payable by and recoverable from all or any of them, the said , or their several executors, administrators or assigns, but, as between them, the said , and their several executors, administrators and assigns, the same yearly rent or sum shall be payable by them respectively, in equal shares and proportions; and if any of them shall be compelled to pay more than his or their joint and equal shares and proportions thereof, or shall be put unto any costs or expenses on account of any non-payment thereof, he or they shall be repaid and re-imbursed the same, by the party or parties by or through whose default it shall have happened.

Proviso that  
leasees shall be  
all answerable  
to the lessor  
for the rent,  
but as between  
themselves,  
shall pay the  
same in certain  
proportions.

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## SECTION V.

*Of the Covenants.*Covenants for  
title.

In all conveyances there should be covenants for title, and a regular chain of them: they should always be made with the person to whom the estate is conveyed, and if any uses are declared upon the conveyance, the *celles que trust* are entitled to the benefit of the covenants. The usual covenants by a vendor are,—That he is seised,—has good right to convey,—for quiet enjoyment by the purchaser,—that the premises are free from incumbrances,—and that he will make further assurance.

Mortgagor's  
and vendor's  
covenants.

On a mortgage, the mortgagor's covenants for title are general against all the world. On a sale, the vendor, if he purchased the estate himself, covenants only for *his own* acts; if the property came to him by devise, descent or settlement, he covenants *for his own acts*, and those of the *persons under whom he claims*.

Covenants by  
trustees.

Where an estate is conveyed by trustees or assignees, they do not enter into covenants for title, but merely covenant that they have done no act to encumber: in such cases, however, the *celles que trust*, or assignor, should always be made to enter into such covenants.

Other cove-  
nants.

Besides the covenants for title, there may be, and frequently are, a variety of other covenants, such, for instance, as covenants for the production of title-deeds, where part, only, of an estate is sold, and the deeds are either retained by the vendor, or given to the purchaser of the other part of the estate;—a covenant that an

Covenants for title will vary according to the nature of the property; as, whether it be freehold, copyhold, leasehold, or personal chattels, or comprise two or more of these different kinds.

In all covenants it is usual and proper to name the person by whom the requests shall be made, and also the fund from which or the persons by whom the costs are to be paid ; the request must be made by the person who is to have the benefit of the covenant, but the payment of the costs must depend on the particular circumstances of each case ; for example

1. Trust estates during the continuance of the trusts defray the costs.
2. Mortgages,—the mortgagor.
3. Purchase-deeds,—the purchaser.

The following forms of covenants may be found useful to the young conveyancer.

And the said doth hereby, for himself, his Mortgage co-  
heirs, executors and administrators, covenant and agree, venant for  
with and to the said , his heirs and assigns, title (short  
that he, the said is lawfully seised of or in form.)  
the hereditaments hereinbefore granted and released, in  
fee-simple in possession, free from all incumbrances ;

CHAP. I.  
SEC. V.

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And that he, the said \_\_\_\_\_ hath full power to grant and release the premises, unto and to the use of the said \_\_\_\_\_, his heirs and assigns, upon the trusts and in manner aforesaid ;

And that it shall be lawful for the said \_\_\_\_\_, his heirs or assigns, at all times after such default shall have been made by the said \_\_\_\_\_, his heirs, executors, administrators, and assigns, peaceably and quietly to enjoy the premises, and to receive the rents, issues and profits thereof, without any interruption or disturbance from him, the said \_\_\_\_\_, or his heirs, or from any person or persons whomsoever, and that absolutely discharged, or otherwise, by the said \_\_\_\_\_, his heirs, executors or administrators, indemnified from all conveyances, charges and incumbrances whatsoever ;

And further, that he, the said \_\_\_\_\_ and his heirs, and all persons whatsoever lawfully or equitably claiming any estate or interest in the said hereditaments or premises, or any part thereof, shall and will, upon the request of the said \_\_\_\_\_, his heirs or assigns, execute all such further assurances as may be required by him, the said \_\_\_\_\_

his heirs or assigns, for releasing or conveying the premises unto and to the use of the said \_\_\_\_\_, his heirs and assigns in manner aforesaid ;

And it is hereby agreed and declared, that the expense of all such further assurances as shall be required to be made, before the actual sale and conveyance of the premises to a purchaser or purchasers thereof, in pursuance of the trusts hereinbefore contained, shall be borne by the said \_\_\_\_\_ his heirs, executors or administrators, but that the expense of all other such further assurances as aforesaid, shall be borne by the person or persons requiring the same :

PROVIDED ALWAYS that it shall be lawful for the said \_\_\_\_\_ his heirs or assigns, to enjoy the said premises without the disturbance of the said \_\_\_\_\_, his heirs or assigns, until default shall be made in payment of the said sum of £—, or the interest thereof, or any part thereof respectively.

AND each and every of them, the said \_\_\_\_\_, doth, CHAP. I.  
SEC. V.  
for himself, his heirs, executors and administrators, and to  
the extent only in damages or recompence of interests or  
benefits which they respectively take, or are entitled to, Covenant, com-  
mencement of,  
under the said will of the said \_\_\_\_\_ in the said sum to purchaser  
for persons en-  
titled to shares  
of £—— paid by the said \_\_\_\_\_ for the purchase of of the purchase-  
money of lands  
sold.  
the said \_\_\_\_\_ and other hereditaments hereinbefore  
mentioned to be hereby released, and the said  
doth, for himself, his heirs, executors and administrators, and  
to the extent only in damages or recompence of the interest  
or benefit which the said \_\_\_\_\_ his wife, or he in her  
right takes, or is entitled to under the said will of the said  
\_\_\_\_\_ in the said sum of £——, covenant, promise  
and agree, that &c.

And the said \_\_\_\_\_, doth, for himself, his heirs, —when, of the  
executors and administrators, and for the estate, title, posses- grantors, one is  
tenant for life,  
and the others  
sion or further assurance, during his life only, of the said \_\_\_\_\_  
\_\_\_\_\_, hereinbefore released or intended so to be; have the re-  
mainders in  
fee.  
And the said \_\_\_\_\_ doth, for himself his heirs, &c.,  
and for the estate, title, possession and further assurance of  
the same \_\_\_\_\_, and other hereditaments in reversion,  
or remainder, in fee simple immediately expectant on the  
decease of the said \_\_\_\_\_, covenant &c.

1. "Absolute authority to grant &c.," To and upon the Alteration in  
covenants for  
title where the  
estate is limited to uses &c.  
to prevent  
dower.  
uses and trusts, and with the power hereinbefore declared  
and contained thereof for the benefit of the said \_\_\_\_\_,  
his heirs and assigns, according to the true meaning &c.

2. "And that it shall be lawful for the said \_\_\_\_\_, his  
"heirs" appointees and assigns, from time to time &c.

3. "Shall and will, upon every reasonable request of the  
"said \_\_\_\_\_, his heirs," appointees and assigns, make  
&c., further conveyances for granting &c., To and upon the  
uses and trusts, and with the powers hereinbefore declared  
and contained thereof, or in any other manner, as by the  
said \_\_\_\_\_, his heirs, appointees or assigns, or  
any &c.



CHAP. I.  
SEC. V.

Covenants for  
title, alteration  
in,—when the  
estate is limited  
to uses or upon  
trusts.

1. "Absolute authority to grant &c." To and upon the uses and trusts, and with and subject to the powers and provisoes hereinbefore declared and contained, of and concerning &c., according &c.

2. "And that all and singular the said &c.," shall and may, for ever hereafter, go and remain, to and upon, and subject to the same uses, trusts, powers and provisoes, and shall and may be peaceably and quietly had, held and enjoyed, and the rents, issues and profits thereof, and every part thereof, had, received and taken accordingly, without, &c., And that free &c.

3. "And shall and will, upon the request &c.," assignees, or any person or persons for the time being, entitled under any of the uses, trusts, powers and provisoes aforesaid, make, do, &c., To and upon the uses &c., hereinbefore contained, of and concerning the same, as by the said assignees, or any person or persons, for the time being, entitled as aforesaid, or &c.

Covenant to  
obtain convey-  
ance from in-  
fant-trustee at  
21.

And the said doth hereby, for himself, his heirs, executors and administrators, covenant, promise and agree, with and to the said his heirs and assigns, in manner following, (that is to say), That when and as soon as the said , or his heirs, shall attain the age of 21 years, and be otherwise by law competent to convey his or their before-mentioned trust estate or interest in the ; hereinbefore released or intended so to be, then, and thereupon, or as soon as may be thereafter, the said , his heirs, executors or administrators, shall and will, at his or their own costs and charges, cause and procure the said , or his heirs, by and with all proper deeds and assurances, well and effectually to convey and assure the said , for and according to his and their said estate and interest therein, To and upon the uses and trusts, and with the powers hereinbefore declared and contained thereof, or to, upon and in such uses, trusts and manner as the said , his heirs and assigns shall, in that behalf, order and direct, and that the said , his heirs,

executors and administrators shall and will, in the mean time, and until such conveyance as aforesaid shall be made, save, protect, keep harmless and indemnified the said , his heirs and assigns of, from, and against all evictions, interruptions, actions, suits, costs, damages, losses and expenses whatsoever, to be occasioned to or incurred by him or them, for or by reason, or in consequence, of the before-mentioned trust estate and interest being outstanding in the said , or his heirs.

The said in pursuance of the said recited Covenant to allow Bills of Exchange, to be drawn, and to accept and afterwards pay the same.

agreement on his part, doth hereby, for himself, his heirs, executors and administrators, covenant, promise and agree, with and to the said , his executors, administrators and assigns, in manner following, (that is to say), That it shall and may be lawful, to and for the said , to draw in favour of the said , or their respective executors, administrators or assigns, such several bills of exchange, or sets of bills of exchange, for such sums of money, and payable at such times respectively as hereinafter mentioned, (namely) the first of such bills or sets of bills to be drawn on the day of , which will be in the year 18 , for , or any sum or sums not exceeding that sum in the whole, the second of such bills or sets of bills to be drawn on the day of , which will be in the year 18 for &c., which several bills or sets of bills of exchange shall be payable in at . And further, that he the said , his heirs, executors or administrators shall and will accept, and afterwards duly and punctually pay and answer the several bills and sets of bills of exchange, to be drawn upon as aforesaid, according to the terms and effect thereof, and shall and will save, defend, keep harmless and indemnified the said , his heirs, executors and administrators, of and from all actions, suits, costs, damages and expenses, claims and demands whatsoever, for or on account of the

CHAP. I.  
SEC. V.

same, or any of them, or any non-payment of the same respectively.

Covenant to  
pay off a mort-  
gage debt, af-  
fecting an es-  
tate settled by  
the same deed.

And the said doth hereby for &c., covenant &c., with and to the said , his executors, administrators and assigns, that in case the said intended marriage shall take effect, he, the said , his heirs, executors and administrators, shall and will, within twelve calendar months after the solemnization thereof, pay off and satisfy the said mortgage-debt or sum of £— now due and owing unto the said , upon the security of the messuages, lands and hereditaments hereinbefore , and all interest and arrears of interest for the same; And shall and will thereupon, at his and their own costs and charges, cause the estate, term or interest now vested in the said , of or in the said , for securing his said mortgage-debt and interest to be duly unto the said , or the survivor of them, his or assigns, or as he and they shall order and direct, for the better assuring the same , freed and wholly discharged of and from the said mortgage-debt and interest, To, upon and for the several uses, trusts, intents and purposes hereinbefore declared thereof.

Covenant to  
procure release  
of a portion  
when an in-  
fant child shall  
attain 21 or  
die.

And the said doth hereby, for himself &c., covenant, promise and agree, with and to the said , his heirs and assigns, that when and as soon as the said shall attain the age of 21 years, or shall die under that age, then, and thereupon, or as soon as may be thereafter, the said , his heirs, executors or administrators shall and will, at his and their own costs and charges, cause and procure the said , or the person or persons who under the trusts of , shall be entitled to the said , well and effectually to release and discharge the , and other premises term, of and from the same , and all interest and arrears of interest for the same; And also

# COVENANTS.

63

shall and will, at the like costs and charges, cause and procure a true and attested copy of such release, to be made and delivered unto the said , his heirs or assigns, And that the said , his heirs, executors or administrators shall and will, in the mean time, and until such release as aforesaid, save, keep harmless and indemnified, the said , his heirs and assigns, of, from and against all actions, suits, costs, damages, losses and expenses whatsoever, to be occasioned to or incurred by him or them, for, by reason or on account of the said and the interest thereof, or any non-payment of the same.

CHAP. I.  
SEC. V.

Now THIS INDENTURE WITNESSETH, that the said Covenant to , in further pursuance of the said recited pay accepted agreements on their parts, do hereby jointly and severally Bills of Ex- change when due. for themselves and each of them, their and each of their several heirs, executors and administrators, covenant, promise and agree, with and to the said , their executors, administrators and assigns, that they, the said , or one of them, their or one of their several heirs, executors or administrators, shall and will well and truly, duly and punctually answer and pay the said several bills of exchange, by them accepted as aforesaid, and every of them when and as the same shall severally become due according to the tenor and effect thereof, and save, defend, keep harmless and indemnified the said , and every of them, their and every of their heirs, executors, administrators and assigns, of, from and against all actions, suits, damages, expenses, claims and demands for or on account of the same bills or any of them or any non-payment of the same respectively.

And the said doth hereby for himself, his Covenants for heirs, executors and administrators, covenant, promise and agree, with and to the said his executors and administrators in manner following (that is to say), That he,

CHAP. I.  
SEC. V.

the said \_\_\_\_\_ now is well and sufficiently entitled unto, and has good right and absolute authority to bargain, sell and assign the \_\_\_\_\_ premises hereinbefore mentioned to be hereby bargained, sold and assigned, and every part thereof, to the said \_\_\_\_\_ his executors, administrators and assigns, in manner aforesaid, according to the true intent of these presents, and that he, the said \_\_\_\_\_ shall not, nor will, at any time hereafter, revoke the powers hereinbefore contained for recovering and enforcing payment of the same, but that all the same premises shall and may be peaceably held, received, retained and applied by the said \_\_\_\_\_, his executors, administrators and assigns, in manner aforesaid, according to the true intent of these presents, and that free and clear, and freely and clearly acquitted, exonerated and discharged of and from, or well and sufficiently saved and indemnified against all former and other assignments, charges, claims and incumbrances whatsoever; AND FURTHER; that he, the said \_\_\_\_\_, and all and every other persons and person whosoever having or claiming, or who shall or may have or claim any right, title or interest, of, in, to, or out of the \_\_\_\_\_ premises hereby assigned, or intended so to be, or any part thereof, shall and will at any time hereafter, at his and their own costs and expenses, upon every reasonable request of the said \_\_\_\_\_, his executors, administrators or assigns, make, do and execute, or cause and procure to be made, done and executed, all and singular such further and other lawful and reasonable acts, deeds and things whatsoever, for the further and more effectually assigning of the \_\_\_\_\_ premises hereby assigned, or intended so to be, as aforesaid, and every part thereof unto the said \_\_\_\_\_ his executors, administrators and assigns, or for empowering and enabling him or them to recover and receive the same in manner aforesaid, as by him, them or any of them, or by his, their or any of their counsel in the law, shall be reasonably advised, or devised and required.

AND MOREOVER, that the said \_\_\_\_\_, his heirs or assigns, shall and will from time to time, and at all times hereafter, unless prevented by fire or some other inevitable accident, upon every reasonable request or notice in writing, and at the proper costs and charges of the said \_\_\_\_\_, his heirs or assigns, or any of them, produce and shew forth, or cause and procure to be produced and shewn forth, to the said \_\_\_\_\_, his heirs or assigns, or any of them, or his, their, or any of their counsel, agents or attornies, or at any trial, hearing, commission or examination, in, or directed by any court or courts of law or equity in England, all and every or any of the several deeds, evidences and writings mentioned or comprised in the schedule to these presents, which deeds, evidences and writings relate to and concern the estate and title of and to, not only the \_\_\_\_\_ and other \_\_\_\_\_ hereby or intended so to be, but also certain other \_\_\_\_\_ or \_\_\_\_\_ of greater value when and as often as there shall be occasion to inspect or produce the same or any of them for the maintenance, making out, defending or proving the estate, right, title, property or possession of him, the said \_\_\_\_\_ his heirs or assigns, or his or their trustee or trustees, or any of them, to or in the \_\_\_\_\_ and other \_\_\_\_\_ hereinbefore \_\_\_\_\_ or intended so to be or any part thereof, and also shall and will at the like requests, costs and charges of the said \_\_\_\_\_, his heirs or assigns, or any of them, cause to be made out and delivered to him, them or any of them, any copy or copies, attested or unattested, of all and every or any of the said deeds, evidences and writings, and likewise shall and will, in the mean time, keep and preserve the said deeds, evidences and writings, and every of them safe, whole, uncanceled and undefaced, all losses and damages by fire or any other inevitable accident as aforesaid only excepted. (1)

(1) It is the general practice to take this covenant by a separate instrument, 1 Prest. Abtrts. 28.

CHAP. I.

SEC. V.

Covenant for  
production of  
title-deeds,  
where held by  
vendor (short  
form).

CHAP. I.  
SEC. V.

Covenant for  
production of  
title - deeds  
where held by  
greatest pur-  
chaser at an  
auction.

AND WHEREAS the several deeds, evidences and writings comprised or mentioned in the schedule to these presents, relate to and concern the estate and title of or to, not only the said purchased by the said as aforesaid, but also the estate and title of and to the other hereditaments comprised in and exposed to sale by the said in lots as aforesaid, and which last mentioned hereditaments are of much greater value; and it was one of the conditions of the aforesaid printed particulars of sale, that the same deeds, evidences and writings should belong and be delivered over to the greatest purchaser in value of the thereby proposed to be sold, but should be produced from time to time by such purchaser, his or her heirs or assigns, for the several benefits of the respective purchasers of the remaining lots therein comprised and their several heirs and assigns;

AND WHEREAS the said was the greatest purchaser in value of the comprised in the said particulars of sale, and he hath since completed his purchase thereof, and thereupon the said deeds, evidences and writings were delivered to him according to the said condition of sale in that behalf as he doth hereby acknowledge, NOW THEREFORE THIS INDENTURE WITNESSETH, and the said, for himself, his heirs, executors and administrators, doth hereby covenant, promise and agree, with and to the said and assigns, that he, the said or assigns, shall and will from time to time and at all times, unless prevented by fire or some other inevitable accident, upon every reasonable request or notice in writing, and at the proper costs and charges of the said or assigns, or any of them, produce and shew forth, or cause and procure to be produced and shewn forth, to the said or assigns, or any of them, or to his and their counsel, agents or attornies, or at any trial, hearing, commission or examination, in, or directed by any court or courts of law or equity or any competent court of judicature, or any arbitration or arbi-

trations, properly authorized, all and every or any of the deeds, evidences and writings mentioned and comprised in the said schedule to these presents, when and as often as there shall be occasion to inspect and produce the same, or any of them, for the maintenance, making out, defending or proving the estate, right, title, property or possession of him, the said                    or assigns, or his or their trustee or trustees, or any of them, in or to the said hereby                    or intended so to be, or any part thereof, and also shall and will at the like requests, costs and charges of the said                    or assigns, or any of them, cause to be made out and delivered to him, them, or any of them, any copy or copies, attested or unattested, of all and every or any of the said deeds, evidences and writings, and likewise shall and will in the mean time keep and preserve the said deeds, evidences and writings, and every of them, whole, uncanceled and undelivered, all losses and damages by fire or any other inevitable accident as aforesaid only excepted.

## SECTION VI.

### *Of the execution of Deeds.*

When a deed is executed under the authority of a power of attorney, the principal, and not the attorney, should be party to the deed; and the agent, or attorney, must subscribe the name of his principal,<sup>1</sup> and not his own, as is frequently done, for he thereby renders himself responsible.

The proper form of signature is,—

“ A. B, (*the principal*),  
by C. D, his attorney.”

And the clause of attestation may be “ signed, sealed and delivered &c., by the aforesaid (*the attorney*), in the name, as the attorney, and as the act and deed of



CHAP. I.  
SEC. VI.

“ the within-named (*the principal.*) by virtue of a power or authority enabling him thereunto, a true and attested copy whereof (or “ a counterpart whereof”) is hereunto annexed, hath hereunto set the hand and seal of the said (*principal*), the day and year &c.”

And the delivery should be in this form, “ I deliver this as the act and deed of the within-named (*the principal.*)”

The power must be under hand and seal, or it will not authorize the execution of a deed ; and there should be two parts of it, the one to be retained by the attorney, the other to be annexed to the deed, because the grantee under a deed, executed by virtue of a power of attorney, has a right, at any time, to call for the power to satisfy himself or others claiming under him of the competency of the authority.

Of the execution of a deed by a trustee appointed under 6 Geo. iv.

On a conveyance to new trustees, appointed by the Court of Chancery under the 6th Geo. IV, c. 74, the name of the old trustee should be inserted throughout the conveyance, as if it was to be executed by him personally, and the deed should be executed in this form,—

“ A. B, (*the old trustee*)

by

C. D,” (*the person appointed by the Court to convey.*)

There must of course be inserted a full recital of the order of the court authorizing him to convey.

Of execution by infants, conveying under an order of court.

When, under the decree or order of a Court of Equity, some of the grantors are infants, it is the practice to make the infants parties, but to suspend their executing the deed till they are of age, although the language of the order is “ that all proper parties, except A. B, C. D, “ infants, join in the conveyance.”

## CHAPTER II.

### OF SETTLEMENTS.

1. *Of the settlement of personal estate.*
2. *Of the settlement of real estate.*

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#### SECTION I.

##### *Of the Settlement of Personal Estate.*

Where the property to be settled belongs to the wife, Settlement of the property of intended wife. and consists of money upon mortgage, or bond, the securities must be recited in the intended settlement, which may be done very briefly, and even by a general reference merely specifying the sums. The mortgages should each be transferred by a separate deed to the trustees of the settlement, with an assignment to them of the money, and they must, by such separate deed, be declared to stand possessed thereof, upon the trusts of the settlement; and where there are several mortgages, all of them may be assigned by a deed to be enrolled, so that the trustees may have evidence of the title to the real estate by resorting to the enrolment. By this means the trusts of the settlement are not exposed, and, upon payment of the money, the transfer of the mortgage may be delivered up to the owner of the estate, and the mortgagor has in his custody or power the means of shewing a deduction of title to the legal estate, and a discharge of the money, without any resort to the settlement which must necessarily remain with the trustees.

In the settlement, the trustees are declared to stand

CHAP. II.  
SEC. I.

possessed of the mortgage-monies assigned to them by such separate deeds, and of the monies due on bonds &c. (1), (which may be assigned to them by the settlement itself) In trust for the wife until the marriage, and, afterwards, In trust either to continue the same on the present securities (with a power of attorney to receive the same and give discharges as in the common form with a proviso that the receipt &c. of the trustees should be good discharges), or with the consent of the parties to call them in, and from time to time to place the same out again upon new securities, &c., and to pay the interest to the husband for life. If the property be wholly the wife's, and she survive, it is usual, in that case, to declare it to be In trust for her, but if she die in her husband's lifetime in trust for the children in the usual manner.-

General plan of  
the settlement.

No general plan can be laid down: every settlement will, of course, vary with the intent of the parties and their views and circumstances. Generally speaking, the husband has a life-interest in the first instance: sometimes that interest, when the husband is in trade and the settled property moves from the wife, is made defeasible on his bankruptcy or insolvency, and when that is the case care should be taken to secure the income to the wife for her separate use during the coverture, and to the issue of the marriage after her death, though it should happen in her husband's life-time. Sometimes, the intended wife takes the immediate income by way of separate use during her coverture; or a part thereof, as a given sum a year, is secured to her by way of pin-money, and the residue made payable to the husband

(1) The settlement should recite the transfer of the mortgages and the references to the trusts.

during his life, and after the death of either the whole is given to the survivor for life. Sometimes a power of appointment is reserved to the husband and wife jointly by deed, and to the survivor of them by deed or will, to appoint the trust-money amongst their children in such shares as they shall think fit; in such a case, they, or the survivor, should always be empowered to appoint to grandchildren as well as children, for then, in case of bankruptcy, extravagance &c., the parents may pass over the child and provide for the issue of such child, or, in the event of the death of a child, give the issue the share of the child so dying; but, observe, the issue must be born in the lifetime of the husband and wife, or the survivor, or within twenty-one years after the death of the survivor, and, that the power may be good, it must contain a limitation to that effect: The following form will embrace these conditions in reference to real estate.—

To the use of all and every other such one or more, ex-clusively of the other or others of the child or children of the said [*husband*], on the body of the said [*wife*], his intended wife, to be begotten, or of the issue of any of the same child or children, who shall depart this life in the lifetime of the said [*husband*] and [*wife*,] or the survivor of them, leaving issue then living at such age or time, ages or times, in such shares and proportions, for such estate or estates of inheritance, charged with such yearly, or other sum or sums of money, and with such conditions and limitations over, (the same sum or sums of money, conditions or limitations over, being for the benefit of some other or others of such children or issue) as the said [*husband*] and [*wife*,] by any deed or deeds, writing or writings, with or without power of revocation, to be sealed and delivered by them in the presence of and attested by two or more witnesses, shall, at

Power for  
parents jointly,  
and survivor, to  
appoint lands  
among chil-  
dren.

CHAP. II.  
SEC. I.

any time or times, jointly direct, limit, or appoint. And, for want of such joint direction, limitation or appointment, or so far as the same, if incomplete, shall not extend, (1) then as the survivor of them, the said [*husband*] and [*wife*], shall by any deed or deeds, writing or writings, with or without power of revocation, to be sealed and delivered by him or her in the presence of and attested by two or more witnesses, or by his or her last will and testament in writing, to be by him or her signed and published in the presence of and attested by three or more witnesses, direct, limit and appoint, and for want of such direction, limitation or appointment, or so far as the same, if incomplete, shall not extend, Then,—

Proper powers  
for trustees.

A power is also generally given to the trustees, with the consent of the husband and wife, or of the survivor, to lay out the trust-monies in land, but, nevertheless, to be deemed personal estate, for it would be improper to alter the nature of the trust-fund, and it is a general rule that the acts of trustees shall not vary the interests of parties, except where the trustees have a discretion, and then, whether they exercise it or omit to exercise it, the fund must be taken as found, for there is no equity between real and personal representatives, or on the part of the crown claiming by escheat. This power for the trustees to lay out the trust-monies in the purchase of lands, may be useful in a variety of ways, as for bettering or securing the fund, especially where the trusts may be of long duration (2). Another advantage is, that if the parents be desirous of retiring, they may purchase an estate for residence, but, in this case, the powers should be con-

(1) Sometimes thus :—" If the said — shall survive the said —, then as the said —, after his (or "her") decease, by any deed, &c.

(2) Money intended to be settled upon trusts, that they may have long continuance,—improper to let it remain so. The right way is to direct it to be laid out in lands ; in which case the property is not only secure, but may, by a change of circumstances, become materially enhanced in value. Points in Conv., 79.

fixed to the period of their joint lives; or, if they be in possession of other lands, this power may enable them to make purchase of any contiguous property, so as greatly to improve the value of the family estate.

CHAP. II.  
SEC. I.

If stock or money in the funds is to be settled, as it will not (strictly speaking) pass by an assignment by deed, but only by transfer in the Bank books, the party to whom it belongs sometimes enters into a covenant with the trustees to transfer accordingly, and the trustees are declared to stand possessed thereof, upon such and such trusts. The more common practice, and, as it seems, the safer and better in every view, is to have the stock transferred prior to the marriage, when it is vested in any of the parties, or, at all events, a letter of attorney should be executed for the immediate transfer of the same; but when the stock is in the name of trustees, and the parties have merely an equitable interest in the stock, it is to be assigned as a *chose in action*.

Settlement of  
stock.

In limiting the property of the wife, more care is necessary than in limiting that of the husband, as he can, without any express authority, make a will, and thereof it is sufficient to limit the property to him, his executors &c. The wife, therefore, should have power to dispose of her property by will (only), notwithstanding coverture, and the ultimate trust, in the event of his making no will, should be to her husband. The advantages of this mode are.—1st. That she can only dispose of her property by an act, revocable at any time during her life, by which she always retains the means of conferring a favour on her husband.—2nd. If she wish to leave the property from him, she can do so.—3d. If she wishes him to have it, she has only to leave her power unexercised, and then he will take by way of

Proper form of  
imitation of  
wife's personal  
estate.

CHAP. II.  
SEC. I.

expectant trust, which is better than taking under an appointment, as it saves the expense of the appointment, probate, &c.

Settlement of  
leasehold.

If leasehold for years is to be settled, it must be assigned to trustees, in trust (if the lease be renewable), out of the rents, or by mortgage, to pay the rent, and to renew the lease (1), and, subject thereto, in trust for the husband and wife successively (not for and during their lives, because a life-estate is supposed, in law, to be a greater interest than the longest term, but) for and during so many years of the term now existing, and to be acquired by the renewed lease, as they shall live, and, after the death of the survivor, in trust for such son of the marriage as shall first attain the age of twenty-one years; and if there be no sons, or none who shall attain the age of twenty-one years, in trust for the daughters equally, with benefit of survivorship in case any of them should die under twenty-one.

It is sometimes the intention to exclude a son, only in case he die under twenty-one, without issue living at the time of his death; and it may be the intention of the settlor that the issue shall be substituted in the place of a deceased son or daughter, in either case limitations should be introduced, embracing these points.

Settlement of  
leasehold and  
freehold to-  
gether.

In settling leaseholds, so as to keep them and freeholds together, care should be taken to prevent the leasehold actually vesting in a son, until he attain twenty-one; and, if he die under twenty-one, leaving issue, the leasehold should be limited to the issue,

(1) If the renewal is to be made out of the rent, the whole charge might happen to fall on the tenant for life, which, in some cases, may be hard. A more equitable plan would be, to direct a portion of the rent to be annually reserved, to answer the fines on renewal.

otherwise one would go to the personal representative of the son, and the other to his issue. As leaseholds are incapable of being entailed, it is necessary to declare that they shall vest absolutely in the son who first attains twenty-one, for if they be settled in the same words as are used for freehold lands, the whole would vest in the eldest son, immediately on his being born, and if he should die under twenty-one would go to his personal representative, and not to the other children, unless they took as his next of kin. Leaseholds for lives may be entailed, but such estates not being within the Statute *de donis*, these limitations are only *quasi* entails, and may be barred by the first tenant in tail, by a fine *sur concessit*, by simple alienation, or even by surrendering the existing lease and taking a new one.

AND UPON THIS FURTHER TRUST, that if there shall be no child or other issue of the said [*husband*], by the said [*wife*], who shall become absolutely entitled under any of the trusts or powers aforesaid, to the said trust-monies, stocks, funds and securities, then the same trust-monies, stocks, funds and securities, or so much thereof as shall not have been disposed of pursuant to any of the powers aforesaid, shall, from and immediately after the death of the said , and such want and failure of issue as aforesaid, go and be held upon and for the several further intents, trusts and purposes following (that is to say), As to the said [*describe the property*], or so much thereof as shall not have been disposed of under any of the powers aforesaid, and the dividends, interest and annual produce thereof, and the accumulations therefrom, if any,

Ultimate trust in marriage settlement of personalty, part for husband and part for wife, in default of issue.

IN TRUST to assign, transfer and pay the same unto the said [*husband*], his executors, administrators or assigns, for his or their absolute benefit; AND as to the said [*describe the property*], or so much thereof as shall not have been disposed of under any of the powers aforesaid,



CHAP. II.  
SEC. I.

and the dividends, interest or annual produce thereof, and accumulations therefrom (if any),

IN TRUST, in case the said [*wife*] shall survive the said [*husband*], to transfer, or assign and pay the same respectively, unto her, the said [*wife*], her executors, administrators or assigns, for her or their own benefit; BUT in case she, the said [*wife*], shall die in the lifetime of the said [*husband*],

IN TRUST to transfer, or assign and pay the last-mentioned trust-monies, stocks, funds, securities, dividends and accumulations respectively, to such person or persons, for such intents and purposes, and with and subject to such powers, provisos and declarations as the said [*wife*], by her last will and testament in writing, or any writing in the nature of a last will and testament, or any codicil or codicils thereto, to be by her signed and published in the presence of and attested by two or more witnesses, shall, from time to time, notwithstanding her said intended coverture, direct or appoint; AND, in default of any such direction or appointment, or so far as the same, if incomplete, shall not extend, to such person or persons as would have been entitled thereto as her next of kin, at the time of such her decease, and such default of issue as aforesaid, under the Statute for the distribution of intestate's personal effects, if the said [*wife*] had then died sole and intestate, to the utter exclusion of the said [*husband*], as her administrator, or by the rights of marriage, or otherwise;

Ultimate trusts  
of personality  
for wife, in de-  
fault of issue.

AND UPON THIS FURTHER TRUST, that if there shall be no child or other issue of the said [*husband*] by the said [*wife*], who shall become absolutely entitled under any of the trusts or powers aforesaid, to the said trust-monies, stocks, funds or securities, then the same trust-monies, stocks, funds or securities, or so much thereof as shall not have been disposed of pursuant to any of the powers aforesaid, and the dividends, interest and annual produce thereof, and accumulations therefrom, if any, shall, from and immediately after the death of the said [*husband*], and such

want or failure of issue as aforesaid, go and be held, upon and for the further trusts, intents and purposes following (that is to say),

UPON TRUST, in case the said [*wife*] shall survive the said [*husband*], then the same trust-monies, funds, securities, dividends and accumulations respectively, shall be transferred, assigned or paid respectively, unto her, the said [*wife*], her executors, administrators or assigns, for her or their own benefit; BUT in case she, the said [*wife*], shall die in the lifetime of the said [*husband*], then, and in such last case, the said trust-monies, funds, &c. shall be transferred, assigned or paid respectively, to such person or persons, for such intents and purposes, and with and subject to such powers, provisoes and declarations as the said [*wife*], by her last will and testament in writing, or any writing in the nature of a last will and testament, or any codicil or codicils thereto, to be by her signed and published in the presence of and attested by two or more witnesses, shall, from time to time, notwithstanding her said intended coverture, direct or appoint; AND, in default of such direction or appointment, or so far as the same, if incomplete, shall not extend, to such person or persons as would have been entitled thereto, as her next of kin, at the time of such her decease, and such default of issue as aforesaid, under the Statute for distribution of intestate's personal effects, if she, the said [*wife*] had then died sole and intestate, to the utter exclusion of the said [*husband*], as her administrator, or by the rights of marriage, or otherwise;

AND UPON THIS FURTHER TRUST, that if there shall be no child or other issue of the said [*husband*] by the said [*wife*], who shall become absolutely entitled, under any of the trusts or powers aforesaid, to the said trust-monies, funds or securities, then the trustees or trustee thereof, for the time being, shall, after the decease of the said [*wife*], and such default of issue as aforesaid, pay, transfer or assign the same, or so

Ultimate trust  
of personalty,  
for husband in  
default of issue.

CHAP. II.  
SEC. I.

much thereof as shall not have been disposed of under any of the powers aforesaid, unto the said [*husband*], his executors, administrators or assigns, for his or their own benefit,

In settlements or conveyances for the benefit of creditors, the following trust is in general necessary.

Trusts for collecting debts.

Upon and for the following trusts, intents and purposes, (that is to say,)

UPON TRUST, when and as soon as the same monies and premises, or any of them, shall become payable, to obtain payment thereof and thereout, in the first place, to pay and satisfy or retain the costs and expenses attending the preparing of these presents, and the execution of the trusts hereby declared; And, in the second place, to (*state the intents and purposes for which the money is collected,*) and, after all the aforesaid monies, interest, costs and expenses shall be wholly paid and satisfied, then,

IN TRUST, to pay and transfer all such parts or so much of the said                      and premises hereby assigned, as shall remain, after answering the same several purposes, unto the said                      , his executors, administrators or assigns, for his and their own benefit:

And it is hereby agreed and declared, between and by the parties hereto, that the receipts in writing of the said                      , his executors, administrators or assigns, shall be sufficient and effectual discharges to any person or persons paying to him or them, pursuant to these presents, all or any part of the monies hereby assigned, or so much thereof respectively, as shall be thereby acknowledged to be received; And that the same person or persons, his, her or their heirs, executors, administrators or assigns, shall not afterwards be answerable or accountable for the loss, misapplication or non-application, or be in any ways obliged to see to the application of the monies in such receipts acknowledged to be received.

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## SECTION II.

CHAP. II.  
SEC. II.*Of the Settlement of Real Estate.*

The settlement of a family estate, which is now of much less frequent occurrence than formerly, and seldom resorted to except by noble families, or commoners of very large landed estate, will, with all its multifarious provisions be best understood by the careful examination of such a settlement (1). The following observations therefore will have reference rather to marriage than family settlements.

In marriage settlements, lands are conveyed to trustees to the use of the husband and his heirs, or to the uses declared in some former deed till the marriage, and after the marriage To the use of the husband for life, and from and after the determination of that estate by forfeiture or otherwise, in his lifetime, to the use of trustees and their heirs during his life, **IN TRUST**, to preserve the contingent uses after limited, and to prevent the same from being defeated or destroyed; And from and after the death of the husband, To the use, intent and purpose, that the wife shall receive a rent-charge for her life, in lieu and bar of dower; And from and after the decease of the husband, **TO THE USE** of trustees for a long term of years, for better securing the rent-charge, and also for raising portions for the younger children of the marriage; And from and after the expiration, or other sooner determination of the term, **TO THE USE** of the first and other sons of the marriage successively in tail general, remainder to the daughters of the marriage, as tenants in common, in tail, with cross remainders among them in tail, remainder to the husband in fee. Under a

General form  
of settlement of  
realty.

(1) See *Atk. Forms and Precedents in Conv.*, p. 487, where will be found a very copious sketch of a deed of this kind, which was drawn by Mr. Butler, and settled by Fearn.

CHAP. II.  
SEC. II.

Limitations in  
strict settle-  
ment.

deed of this nature, the lands are said to be limited in strict settlement, and the following is the technical form in which these limitations are commonly expressed.

To THE USE of the said                      and his assigns, during his natural life without impeachment of or for any manner of waste, and immediately from and after the determination of that estate by forfeiture or otherwise, in the lifetime of the said                      , To THE USE of the said [*trustees to preserve contingent remainders*], their heirs and assigns during the natural life of the said

UPON TRUST to support the contingent uses and estates hereinafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions as occasion may require, but to permit the said                      and his assigns, to receive and take the rents and profits of the said premises during his life, for his and their own benefit, And immediately from and after the decease of the said

To THE USE of the first (1) son of the body of the said                      lawfully begotten, and the heirs of the body of such first son issuing, And for want of such issue

To THE USE of the second and every other son of the body of the said                      , lawfully to be begotten, severally successively and in remainders one after the other, in order and course as such sons shall respectively be in priority of birth, and the heirs of the body and respective bodies of such son and sons issuing ; every elder such son and the heirs of his and their body and respective bodies, being always to take before, and be preferred to every younger of such sons and the heirs of his and their body and respective bodies issuing, And, for want of such issue

To THE USE of all and every the daughter and daughters of the said                      , lawfully bogotten, equally to be divided between them if more than one, as tenants in common, and the heirs of their respective bodies issuing ; And, in case there shall be a want of issue of the body or respective bodies of any such daughter or daughters, then, as

(1) Not confined strictly to primogeniture, but, he failing, second born may take.—*Lomax v. Holmden*, 1 Ves. Sen. 290.

to the part or parts, share or shares, as well original as by survivorship, or survivor of such of them whose issue shall so fail,

CHAP. II.  
SECT. II.

TO THE USE of the remaining or other or others of such daughters, equally to be divided between them, if more than one, as tenants in common, and the heirs of their respective bodies issuing; And in case there shall be a want of such issue of the bodies of all such daughters save one, or if there shall be but one daughter then,

TO THE USE of such remaining or only daughter, and the heirs of her body issuing; And for want of such issue,—

Under these limitations, the husband is seised in fee, or is in of his old estate, until the marriage, and this is done to prevent the limitations to the wife taking effect, and the estate being fettered, in case the marriage should go off. Upon them marriage, that estate in fee ceases, and out of the seisin of the trustees to uses an estate for life springs up to the husband. If he, by making a feoffment in fee, levying a fine, or suffering a recovery, forfeit his estate for life, (for any of these acts would be a forfeiture) an estate in remainder would immediately spring up to the trustees, who are interposed, as the limitation expresses, to preserve contingent remainders to his children. If the tenant for life wish to make a security out of his life estate, without a forfeiture, he should either convey by lease and release, or by feoffment for and during the term of his natural life, or make a demise for a term if he shall so long live.

Effect of limitations in strict settlement.

Where the uses are intended to be such as before stated, if there were no trustees to preserve contingent remainders, and the father should, *before the birth of a child*, commit a forfeiture, the consequence would be,

Forfeiture by the tenant for life.

CHAP. II.  
SECT. II.

that the property being severed, the contingent remainders must fail, and the father would then regain the estate discharged from all the uses of the settlement, save the jointure annuity to his wife, and the portions to his younger children, and the term to secure them. But although the trustees to preserve might be obliged to bring an ejectment (which, in general, may be done where a right of entry accrues) to get into possession of the estate, they must afterwards, under the express words of their trust, permit the rents to be received by the husband, during his life, their interference being merely necessary to preserve the contingent remainders (1).

The jointure-  
annuity.

On the death of the husband, the jointure-annuity to the wife takes effect, and the estate charged with that annuity vests in the eldest son of the marriage in tail, but subject to the trust-term for raising younger children's portions when necessary to be made use of; and the eldest son, on attaining twenty-one, may, without the concurrence of any other person, (as, upon the death of the father, the freehold became vested in him) make a tenant to the *præcipe*, suffer a common recovery, and bar all the subsequent remainders to his brothers and sisters, and also the reversion or remainder in fee, to his father, who may happen to have aliened or devised it, so that it may not have descended.

But the jointure annuity and the term for raising younger children's portions, being both precedent in point of limitation to the estate tail, are not affected by the recovery; and even in a case where such a

(1) Any vested estate of freehold, subsequent to the husband's life estate, would preserve the contingent remainders; as, for instance, a life estate to the wife. Where the legal estate is vested in trustees, a contingent remainder does not require any estate to support it. The estate supporting, and the remainder supported, should be created by the same deed.

term was, by mistake, limited, subsequently to the estate tail, and consequently became barred at law by a recovery, equity ordered it to be revived (1).

CHAP. II.  
SECT. II.

The eldest son having thus acquired the fee simple, may alien, charge, or mortgage it at his pleasure,—subject, however, to the jointure-annuity, and to the portions, which latter are generally attended with interest by way of maintenance, according to the quality and circumstances of the parties. If these portions be wanted, and the trustees have power to raise them by way of mortgage or sale, the term may be assigned by the trustees to a mortgagee, to which assignment the eldest son may be a party if he be willing to join; and, in the proviso for redemption, it may be declared, that on payment of the mortgage-money and interest, the term shall cease, *or shall be surrendered or assigned to, or in trust for, the son.* Or the son himself may make a mortgage in fee for a sum of money to discharge the portions; and the trustees may, on that occasion, assign their term to a trustee for the mortgagee, and to attend the inheritance. If the son be provided with money of his own, he may pay off the portions of his brothers, and sisters, taking releases from them when of age, (which releases are not liable to any other than the common deed stamp,) and the trustees may, after such payment, if the mother be then dead, surrender or assign the term to, or in trust for the son; but if the mother be still living, no assignment or surrender of the term can take place till after her death. If the son have levied a fine, and let in his father's incumbrances, the term should be kept on foot as a protection against them.

Effect of a recovery by the eldest son tenant in tail.

Of the raising and payment of portions.

(1) *Uvedale v. Halfpenny*, 2 P. W., 151.



## CHAP. II.

## SECT. II.

Estate of the  
daughter under  
the settlement,  
when there are  
no sons.

If there be no son of the marriage, but only daughters, then the trusts of the term for raising portions do not take effect, because the daughters become entitled to the estate itself. On the birth of the eldest daughter, an estate tail in the whole of the lands springs up out of the seisin of the trustees to uses, and vests in her;—on the birth of a second daughter, the estate tail of the first is narrowed to one moiety of the land, and an estate tail in the other moiety springs up out of the same seisin, and vests in the second daughter; and, in like manner, upon the birth of every other daughter, the estate tail of the daughters, who are in existence at the birth of another sister, do not cease (1), but are merely narrowed as to their shares of the land, so as to admit the after-born daughters to equal shares with those first born. When the eldest daughter attains twenty-one she may alone suffer a recovery as to her moiety, and the other daughters may do the same as to their respective shares, as they respectively attain majority; or they may wait till the youngest attains twenty-one, and then join in a recovery of the whole estate. There being no issue of the marriage but daughters, the term limited for raising younger children's portions will cease by the proviso for its *cesser* in the settlement, and the daughters will thus acquire the fee simple of the estate free from all the charges of the settlement.

If there be daughters of the marriage, and a son much younger than any of them, the daughters, on attaining twenty-one, are entitled to their money-portion.

(1) As is expressed in Mr Booth's opinion at the end of *Shep. Touch.* for if it did cease, and one of the daughters should be dead, leaving issue at the time of the birth of another daughter of the marriage, the estate tail could not revive as to the issue of the deceased daughter.

tions, and may oblige the trustees of the term to raise them during the infancy of the son, provided such portions be raisable during the mother's lifetime, which, in cases, where her jointure is near the annual value of the estate, it is generally directed shall not be done, as the estate would thereby become too much encumbered. If, after these portions become vested (though not raised), the son should die before twenty-one, or, after that age without having suffered a recovery, the estate devolves to the daughters under the limitations of the settlement, but their portions do not sink in the land because they have not the fee, but only an estate tail; and the consequence is, that if any of the daughters should die without issue, or without having suffered a common recovery, her money-portion would vest in her husband, if married, and, if unmarried, in her personal representatives. If she had suffered a recovery, her money-portion, by that act, became vested in the land. If any of the daughters, tenants in tail, be married, the husband alone may make a tenant to the *præcipe*, as the freehold is in him, but the wife must be vouched along with the husband. If the daughters should all join in the recovery, it would, in some cases, be advisable for them to declare the uses to trustees, In trust, to make partition among them, or to sell the estate and divide the money, or to limit the shares to such uses as they should severally appoint.

Portions for daughters having become vested (though not raised) do not merge on the failure of issue male.

If the family estate happen to be mortgaged or otherwise incumbered at the time when the settlement is made, the wife's fortune should be applied to discharge these incumbrances, or other estates of the husband should be set apart to be sold for that purpose, and the settlement should contain a declaration that the mort-

The wife's fortune should be applied to discharge incumbrances on the settled estate.

CHAP. II.  
SEC. II.

gagees in fee of the settled estate shall, on payment of their mortgage-monies, convey the legal estate to the uses of the settlement, and that the mortgagees for years shall assign their terms to attend and be subservient to these uses.

Conveyance to trustees to sell, for the purpose of discharging incumbrances, and the residue to be settled.

The settlement, and the deed of sale to the trustees, should each state briefly the contents of the other; but, in the deed of sale, it may be sufficient to say that the husband has settled the estate intended to be preserved “to and for the several uses in the said indenture of settlement declared in favour and for the benefit of him and his wife, and the children and issue of their marriage.” Sometimes all the estates of the husband are vested in trustees, to sell a competent part to discharge the incumbrances, and to settle the residue to the intended uses. Where a sale is the primary object, it is advisable to vest the estate in trustees, and to direct that their receipts shall be good discharges, and that the estates which shall ultimately remain unsold, and the surplus of the money arising from the sale, be settled to the uses to be declared by another deed; and the uses should be declared, accordingly, by a separate instrument, and the deed vesting the land in the trustees, should be enrolled (1). The object of having two sets of deeds, is to keep the title of future owners concise, and free from extraneous matters. It is frequently advisable to authorize the trustees to sell all or *any part* of the lands, excepting only that part of the property which is intended for the family residence, for then they can sell those which may be disposed of to most advantage.

(1) See *Atk. Forms and Prec. in Conv.* title “*Settlements*,” for deeds illustrative of these observations.

For want of such a power of discretion, Acts of Parliament are frequently rendered necessary, to enable the trustees to exercise such a power. An application to Parliament is also frequently made, where trustees are directed in the first instance to sell *particular* lands, such a sale being found subsequently either to be impracticable from some difficulty of title, or to be highly prejudicial to the general objects proposed by the settlement.

Copyhold lands may be settled to the same uses as freeholds (if the custom of the manor will admit of it), either by limitations expressed in the surrender, or by reference to a separate deed. If the custom of the manor admit of limitations of the legal estate, (or, in other words, of limitations to uses (1), copyholds may be settled along with freeholds. In the manors lying in the county of Durham, the custom requiring that the legal estate should be vested in trustees, and not admitting of surrenders to trustees to uses, the practice is, when freeholds and copyholds are to be settled together, to vest the legal estate of both in trustees, "In trust for the parties and their issue," so that if portions are to be raised for the younger children, a term of years cannot be limited, but a trust of the fee must be created for the purpose. If there be any particular reason for creating legal estates of the freehold, the copyholds may be surrendered to trustees, and the trusts may either be detailed, or a reference be made to the preceding limitations of the freehold. Some copyhold lands do not admit of an entail, and, in such cases, a limitation to a

(1) The limitation of the use, in copyholds, is the limitation of the seisin, or legal estate.

CHAP. II.  
SEC. II.

man and the heirs of his body, is a conditional fee; and though many attempts have been made to create an entail of such lands, it seems to be now clearly agreed that this is not attainable. The leasing powers in settlements, may extend to copyholds, if there be a proviso that no lease of them shall be made without the license of the lord, or his steward,—without such precaution, a lease of copyholds, for more than three years, would be a forfeiture to the lord.

Settlement to  
the exclusion  
of the husband.

Where the intention is to settle real or personal estate on the wife and children, to the exclusion of the husband, it must be conveyed or assigned to trustees, In trust for the wife and her heirs or executors and administrators, until the marriage, and, after the solemnization thereof, In trust, during the joint lives of her, and her husband, to pay the rents or interest, and annual produce, to her for her separate use. And if she survive her husband, then to be in trust for her, her heirs or executors, administrators and assigns. But if she die in his lifetime, then, Upon such trusts as she shall by will (only, for if she had such power, by deed, her husband might prevail on her to exercise it in such a way as might enable him to raise money on her property,) appoint, And in default of appointment, In trust for the children, in the usual manner, remainder, In trust for the wife, her heirs, &c. In cases of this description, it is always material to know what is the intent or object of the parties; for it may happen that the intent requires that the wife should have a general power of appointment, in the first instance, by deed or will, though, in most cases,—the first trust is, for the wife's separate use, and then the power of anticipation should be expressly negatived,—the second, for the children of the marriage,

either positively, and in ascertained shares, or as the wife shall appoint,—the third, if there be no children, and the wife survive, for herself in fee.

CHAP. II.  
SEC. II.

Where a rent-charge only is intended to be secured to the wife, without any provision for the children, the lands, in consideration of the wife's fortune and the marriage, are to be conveyed to trustees, to the use of the husband for life, and, after his decease, to the use, intent and purpose, that the wife, in case she shall survive him, shall receive the proposed rent-charge, with a declaration, if such be the intention, that this provision shall be for her jointure, and in bar of dower, with powers of distress and entry ; and, as to the premises, from and immediately after the death of the husband, subject to the rent-charge, to the use of a trustee for a term of years, upon the trusts thereafter declared, with remainder to the husband in fee. The trusts of the term should be declared to be for raising the rent-charge, in case of its being in arrear, and for paying to the executors or administrators of the wife, a proportionate part of it, from the last preceding day of payment ; and there must be the usual proviso, that the trustees shall permit the surplus of the rents to be received, and for the *cesser* of the term when all the trusts have been performed.

Rent-charge to wife, and no provision for children.

Where the estate belongs to the wife, and the intention is, that, subject to a jointure annuity to her, and to portions for younger children, the estate should remain in the joint disposition of the husband and wife, but, in default of such disposition, to be his, it was formerly the practise for the lands to be conveyed to trustees, to the use of the wife and her heirs, until the marriage, and from, and immediately after, the marriage, to the husband for

Settlement of the wife's estate.

CHAP. II.  
SEC. II.

life ; remainder to the use, intent and purpose, that the wife shall receive a rent-charge, with powers of entry and distress ; remainder to trustees for a term, upon the trusts after mentioned, and subject thereto To and for such uses &c., as the husband and wife shall jointly, by deed, appoint ; remainder to the husband in fee. This last limitation is evidently wrong, for it renders the power of appointment a dead letter, as the husband, by simply refusing to join in any appointment, would secure to himself the fee simple: the power, therefore, should either be given to the wife singly, or the ultimate limitation should be to her.

Trusts of the  
term of such a  
settlement.

The trusts of the term should be, in the first place, for raising and paying the jointure annuity, and a proportionate part thereof to the executors or administrators of the wife (1) ; and upon trust, in case there shall be any child or children of the marriage, to raise portions, (that is to say), if there be one child, such a sum ; if there be two children, such a sum &c. ; and, if there should be six or more, so much ; the portions of the sons to be vested at twenty-one, and those of the daughters, at that age, or marriage with the consent of the parents, or the survivor, or his or her executors, previously had,—such consent to be signified by writing, and attested by witnesses, in order that there may be proper evidence of it. If the estate be at all burthened, the portions should, on no account, be made payable before the death of the surviving parent, and there must be the usual clause, that if any of the children die

(1) Some conveyancers object to this, alledging, that as the wife is to have the first payment of her annuity on the first day of payment that shall happen after her husband's death, she is to be considered as having received the proportionate part in advance.

before their portions become vested, the portions of the children so dying shall go over to the others. Where circumstances require it, there should be a provision, that the portion of a younger son becoming an eldest, shall go over to the younger children. Thus, where the husband's estate is settled on the eldest son, the settlement of the mother's estate on the younger son should contain a proviso for divesting it on his becoming an eldest or only son, and, in this case, the settlement of the husband's estate should be recited.

In the clause of survivorship, there should be a provision, that no one child shall have more than a specified sum, nor any two, more than a certain other specified sum; for, without this precaution, a younger child might become entitled to the portions intended for several, and thus, where the estate is settled on the eldest son, become possessed of nearly as large a provision as that of the eldest son,—a circumstance, which is, generally speaking, inconsistent with the intention of the parties to the settlement.

Where there are children intended to take portions, Maintenance, the settlement should contain a power to raise maintenance for them, the amount of which should be limited to a sum below the annual produce of the portion, and will therefore vary with the nature of the property, (as whether real or personal), and also with the rate of interest payable at the time. There should also be a direction that no sale or mortgage shall be made by the trustees for raising portions, till some of them become payable, for otherwise, as the term is limited immediately after the husband's life-estate, a mortgage might be made while the jointress was still living; the trustees should also be authorized, with the consent of



CHAP. II.  
SEC. II.

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the reversioner to raise all the portions at once, and there should also be a power enabling the reversioner to exonerate the land from the portions, on paying, or securing, the amount to the satisfaction of the trustees.

Proper for the wife to have the disposal of a gross sum out of the estate.

It is usual, and very reasonable, that the wife should have the disposal of a sum of money to be raised out of her own estate, in the event of there being no children, which may be done under the trusts of the term for raising portions. This, however, can only be necessary where the fee is limited away from the wife, and there is no chance of her taking it by survivorship, which can seldom be very proper when the estate is her own. Sometimes, even if there be children, she is empowered to have a sum of money raised for the children of a second marriage, or for any person whom she shall, by deed or will, appoint; and this may be without any restriction as to her surviving, according to the intention of the parties.

All outstanding legal estates should be got in.

In every marriage settlement, it is of the greatest importance to get in all legal estates, and to assign all outstanding terms to attend the inheritance, for otherwise the husband might mortgage without notice, and the mortgagee, getting in the outstanding terms, might defeat the settlement to the extent of the mortgage. If the settled estate be in mortgage, it is proper to insert a declaration, that on payment of the principal money and interest, the mortgagee shall convey to the uses of the settlement, and he ought, therefore, to have notice of it. If such conveyance be wanted, the right way is, after reciting the mortgage, to state all the uses of the settlement and the above declaration, and then, for the mortgagee, on payment of the money, to convey to the trustees, "To and for the several uses,

“upon the trusts, &c., mentioned and declared in the “settlement,” with a covenant “that he has done no act “to encumber.” All conveyances to the uses of settlements, may be done by reference in this manner.

CHAP. II.  
SECT. II.

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A provision for a wife or child, by a person in trade, or likely to enter into trade, should never, where the security is merely personal, depend on a contingent event. The intended wife can never be advised to accept so precarious a provision, since it is evident, that if the settlor become a bankrupt before the contingency happen, that his wife and children may go without a farthing of the provision intended for them. If the circumstances of the settlor admit of such an arrangement, the best way would be, to invest a sum of money in the names of trustees, upon trust to pay the interest to the settlor, till the event arises, upon which the wife or children are to have the money, and then, upon trust for the wife or children. In this way they would be effectually protected against the bankruptcy of the settlor. It will frequently happen, however, that the settlor cannot spare the money out of his trade, and, when this is the case, a bond should be entered into for payment of the sum agreed upon immediately after the marriage; and by a deed entered into before the marriage, and made between the obligor, the settlor, the intended wife and the trustees, the trusts of the money may be declared. By this deed, the trustees should have power, at their discretion, to let the money remain in the hands of the obligor; and, in case they should at any time call it in, that they may afterwards, at their discretion, (upon his entering into a new bond, payable at a day certain,) lend it him again, and so from time to time, as often as they should think fit. The deed

Settlements by  
persons in  
trade.

CHAP. II.  
SECT. II.

ought to contain a declaration, that the trustees are not to be considered guilty of a breach of trust, although they should not call in the money received by any such renewed bond, at the time it became payable. In this way, with due vigilance and sound discretion on the part of the trustees, the provision for the wife and children may be pretty well protected, and at the same time the settlor have the use of the money (1).

Effect of a limitation to "survivors or survivor" only.

(1) In the limitation of cross remainders, in old settlements, there is a common mistake, by declaring that on the death and failure of issue of any of the daughters, the shares of such of them so dying without issue, shall be "In trust for the *survivors or survivor* of them, and the heirs of the body, "or respective bodies, of *such survivors or survivor*," which is making the cross remainders contingent, when they ought to be vested. For instance, a father dies, leaving four daughters, two of age and two under age, the eldest daughter marries and dies, leaving children, and, afterwards, another daughter dies without issue, and without having suffered a recovery. In this case it may be doubtful, whether the children of the eldest daughter can take the share which their mother, if living, would have had in the part of the daughter who died after their mother, the limitation being to the survivors or survivor, and their mother having died in the lifetime of the younger sister, and, consequently, not coming within the meaning of these words. It ought, therefore, in all settlements, to be said "survivors or survivor, and others or other &c.," and then the cross remainders will be vested and not contingent; for, in the case above supposed, though the mother first dying cannot be said to be a "survivor," yet she is one of the "other" children.

These observations apply to personal estate, with this difference only, that the executors or administrators of a deceased child who had a vested, not a contingent, interest in the shares of his brothers and sisters, stand in his place instead of his children or descendants. Suppose, for example, a sum of money to be settled upon two children equally, with a clause, that if either of them die under twenty-one, the share of such of them so dying shall be in trust for the survivor of them; the elder attains twenty-one, and dies, leaving an executor, afterwards the younger dies under age. Now as the word "survivor" only is mentioned, and the elder has died first, in strictness, his executor cannot take, because he is not the "survivor;" but if the word "other" had been used instead of the word "survivor" then the accruing interest would have vested in the elder in his lifetime, (for he is the "other," though not the "survivor").

## CHAPTER III.

### OF WILLS.

*Sect. 1. Of the general form and provisions of a will of real and personal estate.*

*Sect. 2. Of the general form and provisions of a will of real and personal estate, or of personal estate only.*

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### SECTION I.

*Of the general form and provisions of a will of real and personal estate.*

A PERSON entitled to a considerable landed and personal estate, and having a wife, sons and daughters, and it being his intention that his wife shall receive an annuity for life, and that the eldest son shall have the real and personal estate charged with portions for the younger children, may make his will in the following manner:—

He may devise the real estate to trustees, to the use, intent and purpose, that his wife shall take a specified annuity, with the usual powers of distress and entry; and, subject thereto, to the use of trustees for a term of years, to commence from his death, upon the trusts after mentioned; remainder to the use of his first and other sons successively, in tail (or in tail male, if such be the intention,) care being taken, in the case of persons who have titles, that that part of the property which is intended as the family estate be kept in the same line

Provision in a will of real and personal estate.

Annuity for widow.

Limitations to the children.

CHAP. III.  
SEC. I.

as the title), remainder to his daughters as tenants in common in tail, with cross remainders between them in tail, with such remainders over as the intention may require. In a will so framed, it is to be observed, that, as the children are made tenants in tail, the eldest son, on attaining twenty-one, may, by suffering a recovery, bar the remainders over. For the purpose of saving the expense of a recovery, the lands might be limited successively to each son in fee, determinable on the event of his dying under twenty-one, without leaving issue at his death; and if he die under twenty-one, leaving issue, the issue may be substituted in his place. With a view, however, of preventing alienation by a son to the prejudice of his children, or those in remainder, it is most common for testators to make each son, in being, tenant for life, with remainders to trustees to preserve, &c., remainder to the daughters, as tenants in common for life, with limitations over of each of the shares, with remainders, as tenants in common in tail, with cross mainders in tail between them.

When the sons are made tenants in tail male, there should be a second series of limitations to them as tenants in tail general.

Trusts of the  
term.

The trusts of the term may be, in the first place, for better securing the annuity to the wife, during her life, and to raise and pay a proportionate part thereof to her executors, after her death, and to raise portions for the younger children; the portions of the sons to vest at twenty-one, and of daughters at that age, or marriage with such consent as may be deemed proper. The trustees should be empowered, out of the rents of the premises comprised in the term, to raise maintenance, the amount of which may be specified by express pro-

vision of the testator, or left to their discretion, according to the circumstances of the parties and the property, —the maintenance to be paid to the wife during her widowhood, and to be applied according to her discretion, but not to be obliged to keep any accounts.

Where the sum to be raised for portions is made to Portions. depend on the number of children,—as a given sum, if there should be so many,—there should be the usual proviso for survivorship among the children; but when a specific sum is to be raised for each child, this proviso is unnecessary, and there should be simply a declaration that the portions of sons shall vest when, and if they attain twenty-one, and of daughters when and if they attain twenty-one, or marry with consent. There is generally, also, a provision that “if any of the younger sons shall die, or become an eldest son, his portion shall go over to the rest,” for otherwise, he would become entitled as well to a money-portion as to the estate; but of this provision it may be observed, that if the younger son, so becoming an eldest son, have previously attained his age of twenty-one years, his portion either has been, or ought to have been, raised. It seems to be improper to recall the portion; but if such be the intent of the parties, the same end may be attained, by directing, on this event, an additional sum, equal to the portion received by such son, to be raised for the other younger children. As all the younger children but one may die under the age of twenty-one, in which case the survivor, by having all the portions accumulate upon him or her, might thus acquire a provision much larger than was intended for a younger child, it is proper to declare that no child, by *accruer*, shall have more than a given sum,—a declaration, how-

CHAP. III.  
SEC. I.

Disposition of  
the surplus.

ever, which is necessary only where there is a clause of *accruer*, and, consequently, should not be inserted where a specific sum is to be raised for the portion of each child.

Then must follow a proviso that the trustees shall suffer the residue of the rents and profits of the premises comprised in the term, which shall not be applied for the purposes before-mentioned, to be received by the person entitled to the land immediately expectant on the term ; but if that surplus would be more than sufficient for the maintenance of the eldest son, a trust may be inserted, that the trustees shall, under the term, raise such sums as they may think proper, or a specific annual sum, for his maintenance during his minority, and that the residue of the rents remaining unapplied shall be invested and disposed of in the same manner as the residue of the personal estate is afterwards directed to be invested and disposed of, where the intention is to apply the residue of the personal estate in the purchase of land. The trusts of the term must be terminated by a proviso for the *cesser* of the term, when all the trusts of it shall have been performed, or become unnecessary or incapable of taking effect.

This last proviso, where the sons are to be made tenants in tail, would complete the disposition of the real estate ; but if, as is the general case, the sons are to be merely tenants for life, there must be added powers of leasing, of sale, exchange and partition, of jointuring and for raising portions for younger children ; and, even if the sons are to be tenants in tail, there should be a power to trustees to lease for [*seven*] years, during the minority of the person for the time being entitled to the first estate, with the exception of the mansion-house, &c., or such other part of the property as it may be deemed expedient

to except from this power; and sometimes, also, it may be proper to enable the sons, when tenants for life, to raise a gross sum,—say £500 or £1,000,—that they may have the means of forming an establishment without anticipating their future income by granting annuities, &c.

CHAP. III.  
SEC. I.

With regard to the personal estate, where the testator does not think it amply sufficient to discharge his debts, the first trust of the term should be to raise and pay out of the rents and profits of the real estate, or by mortgage, such sums of monies as the trustees shall deem expedient or necessary for the payment of his debts; and it may be directed that the personal estate shall, as it comes in, be applied, in paying off or reducing the sums borrowed on mortgage of the real estate; and the residue thereof (reserving the books, furniture, &c., if it be intended to keep them for the eldest son,) may be directed to be laid out in the purchase of lands, to be settled to the same uses as the real estate before devised.

Debts, &c.  
when they  
should be  
charged on the  
real estate.

When the personal estate is known to be amply sufficient for the payment of debts, such part of it as does not consist of furniture, &c., and is not specifically bequeathed, may be given to trustees, “In trust to pay the debts and funeral expenses, and any small pecuniary legacies,” and the residue may be directed to be laid out in the purchase of lands, and settled to the same uses as the real estate; but, in order to prevent the wife from having a double annuity, and the younger children from having double portions, it should be declared that the lands to be purchased with the surplus of the personal estate shall be considered only as an additional security for the raising and payment of the jointure annuity and portions, and the trustees should be

Disposition of  
the personal  
estate, when it  
is considerable.



CHAP. III.  
SEC. I.

Disposition of  
the surplus  
where it is in-  
considerable.

authorized, in the mean time, and until a purchase should be found, to invest the money in government or real security, with the usual power to alter and vary the securities.

When the personal estate is so inconsiderable that it might not be thought worth while to invest the surplus in the purchase of land, such surplus should be directed to accumulate and be, In trust for such of the sons as shall first attain the age of twenty-one, and, if no son should live to attain that age, or there being only one son, if he should die under twenty-one without leaving issue at his death, in trust for the daughters equally, in the same manner as leaseholds for years are limited.

Where the testator intends that a part only of the surplus, which may remain, after the payment of debts, &c. shall be laid out in lands, and that the remainder should go to his wife or younger children, he may, in the beginning of his will, direct such a sum to be laid out in the purchase of lands, and connect the limitations of the lands to be purchased with the subsequent limitations of the real estate.

Power to  
charge the real  
estate, for the  
purpose of pur-  
chasing conti-  
guous lands &c.

Where the personal estate is small, one of the trusts of the term should empower the trustees to take up money under it, for the purpose of purchasing lands which may be contiguous to, or very convenient to go with, the family estate. In consequence of the absence of such a power, considerable inconvenience has sometimes been experienced in executing the trusts of a will.

If debts are to be provided for out of the real estate, they should be directed to be raised out of the trusts of the term, for then a sum sufficient for the payment of all the debts may be taken up at once, and the personal



estate, as it is got in, may then be applied in exonerating the real estate from the money borrowed.

CHAP. III.  
SEC. 1.

If there be leaseholds, either for lives or years, which are to be entailed with the family estate, there should be a direction to renew the leases, either out of the rents and profits of the lands therein comprised, or by mortgage thereof, or that money for that purpose should be raised under the trusts of the term in the freehold estate (1). Settlement of leasehold.

It may be observed, in the last place, that where the trusts of the will are complex, and, especially where part of the lands are to be sold, it is the most prudent course to vest the inheritance in trustees, because the inheritance sells so much better than a term,—and, for this reason, it is very common to apply to Parliament for an Act, authorizing the trustees to sell the inheritance where a term only has been vested in them. Fee, and not a term, should be vested in trustees, where the trusts are complex or the real estate much incumbered.

Where an estate is to be given among a numerous family of children, it is wrong to give it as real estate, because if one die, and leave an infant heir, this prevents the others from selling so advantageously as if the property could be sold entire, or a complete title could be made at once. It is also very proper, under certain circumstances, for the real estate to be sold, but subject to be treated, nevertheless, either as real or personal estate, at the option of the parties, in any subsequent disposition of it. But, in both cases, the execution of the trust may be postponed to any future period, or any given event, with a direction that the rents shall, in the mean time, and until the sale, be applied in the same manner as the interest of the money would have been if the land were sold. And, as the persons entitled to the absolute interest in the

(1) *Allan v. Backhouse*, 2 Ves. & Bea. 65.

CHAP. III.  
 SEC. I.

money to be produced by the sale may elect to have their shares in land—or, in other words, may elect that the estate shall not be sold,—no prejudice can result to any party if the trustees honestly discharge their duty ; for it is a settled point, that where a person is solely entitled to the money to arise from the sale of an estate, he may dispose of it either as real or personal property, and that by deed as well as will, for the act signifies his election which way it shall be considered.

Form of will  
 where testator  
 has a small  
 landed estate.

Where a testator has a small landed property and wishes to make a provision for his family, consisting of a wife, a son and daughters, the son of age, and the daughters of age or nearly so, he may devise the land to a trustee, to the use of him the trustee for a term of years, remainder to the son in fee. The trusts of the term may be, in the first place, for raising and paying the testator's debts, an annuity to the wife, and the daughters' portions,—the portions to vest at twenty-one, or marriage with consent, with a declaration that, as to any, or so many of the daughters as die under twenty-one, the portion or portions of the daughters so dying shall not be raised, with the usual clause that the receipt of the trustee shall be a good discharge, and the proviso for the *cesser* of the term.

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## SECTION II.

CHAP. III.  
SEC. II.*Observations applicable to a will of real and personal estate, or of personal estate only.*

The following plan of a will applies equally to a case where the testator has personal estate only, as where he has both real and personal estate to dispose of, it being his intention to convert the realty: we will therefore suppose a testator's property to consist partly of real and partly of personal estate, and that he wishes to secure an annuity for his wife, and equal portions for his children, he may make his will in the following manner. He should devise the real estate to trustees, In trust, to sell Trust to sell. and apply the money for the purposes after mentioned,—and he may dispose of his furniture, or any specific part of his personal estate, which he intends for his wife, and give any pecuniary legacies he may think proper,—and then bequeath the residue of his personal estate to trustees, In trust, to convert the same into money for the purposes after mentioned, with a declaration that the trustees, their heirs, executors, &c., (1) shall stand possessed of the money arising from the personal estate and from the sale of the real estate, In trust, in the first place, to pay the funeral and testamentary expenses, debts and legacies, and to place out on government, or real security, such a sum of money as will produce the intended annuity for the wife.

(1) For the heir of the surviving trustee may be the person who will sell, and therefore may have the disposition of or controul over the money arising from the real estate. As it is not convenient to have two sets of trustees, namely, the heirs for the produce of the real estate, and the executors for that of the personal estate, it is the practice of some eminent conveyancers to direct, that in case of a sale by the heirs, they shall pay the produce to the executors, &c., and that the executors, &c., shall stand, and be possessed of, &c.

## CHAP. III.

## SEC. II.

Provision for  
debts and an-  
nuity for  
widow.

Provision for  
children,  
when young.

Provision for  
children, when  
nearly of age.

If all the children are young, the next trust may be to place the surplus out at interest, with a direction that the money, so placed out, shall be, In trust for all the children equally, with benefit of survivorship, in the usual manner, with powers to apply the interest of their shares, or a competent part thereof, for their maintenance, and to raise part of the principal for the purpose of placing them out in business. But, on the other hand, if some of the children are nearly of age, a direction to place the money out at interest will not be necessary, but the residue, after the provision for the wife, may be directed to be, In trust for all the children, as above, with a declaration that the shares of such of the children as are under twenty-one, at the time of the testator's death, shall be placed out at interest, and that the interest arising therefrom shall be applied for their maintenance till their portions become payable. There must be the usual direction, that until the sale of the real estate, the rents shall go in the same course as the interest of the money arising from the sale of the real estate is, by the will, directed to be applied in, and also a declaration that the receipt of the trustees shall be a good discharge. If the testator be in business, the trustees should be empowered to compound debts due to his estate, and to admit debts due from it, on *such evidence* as they shall think reasonable and sufficient.

When the  
children are  
young, the wi-  
dow should be  
authorized to  
settle and al-  
low trustees'  
accounts.

If the children be young and numerous, it may be proper to direct that the widow shall annually settle and allow the trustees' accounts; and that after being settled and signed by her, they shall not be questioned by the children or any person claiming under them. Such a clause is more particularly useful, where a share of the residue of the testator's estate is left to one of the

daughter's being a married woman, for her separate use for her life, and at her death among her children, for otherwise they might be induced by their excluded father to give the trustees all possible trouble.

CHAP. III.  
SEC. II.

The provision for the wife, which is generally by way of annuity, may be made either by directing a certain sum to be placed out at interest, and to pay her the produce, which would then vary according to the rate of interest, or such a sum may be directed to be placed out on government securities as will produce the intended income, in which case no more than the amount actually necessary need be invested. On the decease of the testator's widow, or on her marriage, (according to the intention,) the money appropriated for answering her annuity may be directed to fall into and follow the disposition of the residue of the fund out of which it is raised.

Mode of raising the widow's annuity.

If the interest of the children's fortunes be more than sufficient for their maintenance, the surplus should be directed to accumulate and go with the portion from which it arises.

Where the testator's property is so small as to be incapable of supporting his wife and children, without taking a part or the whole of the principal, it may be given to trustees, In trust to apply the surplus, after payment of his funeral and testamentary expenses and debts, to and for the maintenance of his wife, and the maintenance, education and benefit of his children, in such manner as the trustees shall deem most prudent. (1) Where a testator has a small property, and, having no

Form of will where property is small.

(1) Where a testator is possessed of a small property, of which the interest alone is insufficient for the support of his wife, and yet he is still unwilling to give her the absolute property in the whole, he may frame his will after the mode suggested by the case of *Upwell v. Halsey*, 1 P. W. 651.

CHAP. III.  
SEC. II.

children, wishes to provide a maintenance for his wife, without giving her the absolute control of the principal, he may, in cases where the interest or other annual produce of the principal would be insufficient for this purpose, bequeath the whole to trustees, in trust, to invest it in government securities, and thereout, from the dividends and the sale of so much of the principal stock, (as may from time to time be necessary,) to pay her a certain income, bequeathing the residue, after her death, to any other object of his bounty.

Where testator wishes to provide for an extravagant son, &c.

Where a testator has an extravagant son, or other relative for whom he is anxious to provide, without subjecting his bequest to the claims of creditors, there should be a trust for his personal benefit.

Points to be attended to in bequeathing a legacy.

In bequeathing a legacy, the points to be attended to are the following:—1st. A correct description of the legatee.—2d. The amount of the legacy, and the fund from which it is payable.—3d. The time of vesting.—4th. The time of payment.—5th. The conditions (if any), on which it is to be defeated.

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The various provisions proper to be introduced into a will of extensive landed and personal property, will be found to be comprised in the following forms:—

Commence-  
ment.

I [*the testator*] do hereby revoke all wills, codicils and other testamentary dispositions made by me at any time or times heretofore, and declare this to be my last will and testament

General devise  
to trustees for  
a term.

I give and devise all my manors or lordships, or reputed manors or lordships, capital and other messuages, farms, lands, tenements, rectories, advowsons, hereditaments and real estate whatever, in England, Ireland, the West Indies, or elsewhere, of or to which I, or any person or persons in

trust for me, am, is, or are seised or entitled for an estate of freehold and inheritance in fee simple, in possession, reversion, remainder or expectancy, or which I have power by this my will to dispose of, or appoint for an estate of freehold and inheritance in fee simple, in possession, reversion or expectancy, including the capital messuage or mansion house at , and other estates in the counties of, &c., and in Ireland and the West Indies, the reversion whereof is limited to me in and by the indenture of settlement executed on the marriage of my son, &c., with their and every of their rights, royalties, members and appurtenances, and all my estate, right, title and interest therein respectively, But subject to the preceding uses and estates therein respectively, as to such of the same premises as are subject to any use or estate, or uses or estates preceding the estate or interest I have the power to dispose of by this my will, To the uses, &c., hereinafter limited, expressed and declared, of and concerning the same, (that is to say),

To the use of the said [*trustees*], their executors, administrators and assigns, for and during, and unto the full end and term of 1000 years, to commence and be computed from my decease, and thenceforth next ensuing, and fully to be complete and ended, without impeachment, &c.,

Upon and for the trusts, &c., hereinafter expressed and contained of and concerning the same, and from and after the expiration or sooner determination of the same term of 1000 years, and, in the mean time, subject thereto and to the trusts thereof,

To the use of my son, the said, &c., [*limitations in strict settlement*]

And as to the said term of 1000 years, hereinbefore limited to the said [*trustees*], their executors, administrators and assigns, I do declare that the same term is so hereby limited to them upon and for trusts, intents and purposes, hereinafter declared and contained, of and concerning the same, (that is to say)

Declaration of  
the trusts of  
the term.

Upon trust that they the said [*trustees*], or the survivor



CHAP. III.  
SEC. II.

of them, &c., shall and DO, BY DEMISING, assigning or otherwise disposing of the said manors or lordships, and other hereditaments hereby devised, or any of them, or any part thereof, for the whole or any part of the said term of 1000 years, OR BY, with and out of the RENTS, &c., of the said manors, &c., or any of them, OR BY bringing actions against the tenants or occupiers of the same premises, or any of them, for the rents then in arrear, OR by more than one, or by all of the aforesaid ways and means, OR by any other reasonable ways and means, LEVY and raise any sum or sums of MONEY, which shall be necessary, or which they, the said [trustees], or the survivor of them, &c., shall in their or his discretion think fit or expedient to levy and raise for the payment of my funeral and testamentary expenses and debts, and legacies, which I shall give by this my will or by any codicil or codicils hereto ;

And I do hereby declare &c., that the said [trustees] and the survivor &c., Do and shall PAY and apply the monies to be levied and raised by the ways and means aforesaid, or any of them, in or towards the payment, satisfaction and discharge of my said funeral and testamentary expenses, DEBTS and legacies accordingly, [*receipts of trustees to be discharges, and persons paying not bound to inquire whether the personal estate had been previously applied &c.*]

Declaration as to the power given to trustees for the payment of debts out of real estate.

And although I have hereby given my said trustees of the said term of 1000 years, a discretionary power to resort to my said real estates for raising money for payment of my said funeral, &c., before my personal estate, not specifically bequeathed, shall have been applied or exhausted, in or towards the payment thereof, I do hereby declare, that I have given them this discretionary power in order to facilitate the raising of money for the purposes aforesaid, and to prevent the difficulties and delay which might otherwise occur. And therefore, notwithstanding the discretionary power so given by me to the same trustees, as aforesaid, it is my intention, And I do hereby declare, &c., that, though,

as between strangers and my said trustees and the persons claiming under this my will, both or either of the said funds, may be resorted to, as my said trustees or trustee for time being, shall think fit, Yet, as between the person or persons entitled to my personal estate, not hereinafter specifically bequeathed, and the persons entitled to my real estate hereby devised in strict settlement, as hereinbefore is mentioned, my said personal estate, not hereinafter specifically bequeathed, is to be considered as the primary, and the said term of 1000 years, the secondary fund for the payment of my funeral, &c., And therefore, if the real estate shall be first resorted to, the personal estate, not specifically bequeathed, shall, so far as the same will extend, make good the money to be raised out of my said real estate, And for that purpose, as the case may require, either be applied in exoneration of the said real estate, or be laid out in the purchase of lands to be settled to the uses hereinbefore limited by me, of and concerning the hereditaments hereinbefore by me devised.

Personal estate, nevertheless, to be the primary fund for payment of debts.

PROVIDED ALWAYS, that if any person or persons whom I have hereby made tenant or tenants in tail-male of the hereinbefore devised, is, or are now born, or shall hereafter be born in my lifetime, or in due time after my decease, the estate in tail-male hereby devised to each such persons shall cease, and I hereby devise in lieu of it the and other hereditaments by me limited for such estate in tail-male to the person respectively, whose estate in tail male shall so determine, for the term of "his " or her natural life, without impeachment of waste, " remainder" (1) to the aforesaid trustees, and their heirs during the life or respective lives of such person or respective persons, whose estate in tail-male shall so determine, In trust to preserve the contingent remainders, remainder to

Proviso for converting tenant in tail, born in testator's life-time, into tenants for life.

(1) Or thus—"99 years, to be computed from my decease, if he or she shall so long live, subject to impeachment for waste, but with such power of cutting down timber, as hereinafter contained, and with remainder, &c."

CHAP. III.  
SEC. II.

his, her, and their respective first and other sons, severally and successively, according to their respective seniorities.

Proviso for  
cesser of term.

PROVIDED ALWAYS, and I do hereby declare, &c., that when the trusts hereinbefore declared of, &c., shall be fully performed or satisfied, or become, &c., (*cesser of term.*)

Proviso for  
taking name  
and arms.

PROVIDED ALWAYS, and I do hereby declare, &c., that every person, who, by virtue of the limitations hereinbefore contained, or of this proviso, or of any other proviso in this my will, (other than any person claiming under any of the limitations heretofore contained, which precede the use or estate hereinbefore limited to the said *T. G. C.* as aforesaid, or under any of the limitations hereinbefore contained, which are subsequent to the uses or estates, hereinbefore limited to the sons of the said *T. G. C.* born after my decease successively in tail-male) shall become entitled to the possession, or to the receipt of the rents and profits of the said manors, or &c.,

hereinbefore devised, SHALL and do, in the space of one year next after he shall so become entitled to the possession, or to the receipt of the rents and profits of the said manors, &c., , if he shall then be of full age, and if he shall be under age, then, within one year next after he shall attain the age of twenty-one years, take upon himself, and use in all deeds, letters and other writings, whereto, or wherein he shall be a party, or which he shall sign, and upon all other occasions, the SURNAME of — only, and take and use no other surname, and also take, use and bear the ARMS of —, and no other arms, or if such person shall be a peer then the surname of —, together with the title of his peerage and the arms of — quartered together with the armorial bearings belonging to his peerage.

And for that  
purpose apply  
for an Act of  
Parliament.

And also shall and do within the space of one year next after he shall so become entitled, as aforesaid, or next after he shall attain the age of twenty-one years, as the case may be, apply for, and endeavour to obtain an act of parliament, or proper license from the crown, or take such other means as may be requisite to enable and authorize him to take,

use and bear the surname of —, either alone, or together with the title of his peerage, as the case may be, and the arms of —, either alone, or quartered with the armorial bearings belonging to his peerage, as the case may be.

CHAP. III.  
SEC. II.

And I do hereby also declare, &c., that in case any such person shall refuse or neglect to take or use such surname and arms, in manner aforesaid, and to take such steps or means as may be requisite or proper to enable and authorize him so to do within the space of one year, THEN from and immediately after the expiration of the said space of one year, the limitations hereinbefore contained of the said manors, &c., to him so neglecting or refusing, shall cease, determine, and become utterly void.

Limitation over  
on default of  
using the name,  
arms, &c,

And the said manors, &c., shall, in such case, immediately thereupon, devolve to the person next in remainder, under the limitations hereinbefore contained, in the same manner as if such person so neglecting, &c., being tenant for life, was dead, or, being tenant in tail-male, was dead without issue inheritable to such entail.

Subject, nevertheless, and without prejudice to any such jointure or jointures, portion or portions, and the term or terms of years, remedies and securities for the same, respectively, and any such lease or leases, demise or demises, as before such *cesser* or determination of the estate of the person so neglecting, &c., shall have been limited, settled, appointed or created of and in the said manors, &c., hereinbefore devised, or any of them, pursuant to and by virtue of any of the powers hereinafter contained.

And I do hereby declare, &c., that the *cesser* or determination of the estate of any person hereby made tenant for life, with remainder to his issue male in strict settlement, as aforesaid, by force of the proviso last hereinbefore contained, shall not operate to exclude prevent or prejudice any of the contingent remainders hereinbefore limited to his son or sons, or any other person or persons,

BUT that the remainders limited to the said [*trustees to*

CHAP. III.  
SEC. II.

*preserve*], and their heirs, during the lifetime of such tenant for life, shall, after such *cesser* or determination, take effect and continue for preserving such contingent remainders, and giving them effect as they may arise.

And disposition  
of the interme-  
diate rents and  
profits.

And that immediately from and after such *cesser* and determination of such preceding estate for life, And during such suspense and contingency of such then expectant remainders, the said [*trustees to preserve*], their heirs and assigns, shall receive, pay and apply the rents and profits of the said manors, &c., which would belong to such tenant for life, if such *cesser* or determination had not taken place, unto the person to whom the same rents and profits would be or would have been payable under and by virtue of the limitations and provisoes in this my will contained, in case such tenant for life were actually dead; so that from and immediately after such *cesser* and determination, the issue male of such tenant for life, entitled for the time being, under the limitations aforesaid, to the said manors, &c., in remainder, immediately expectant on the decease of such tenant for life, may be entitled to the rents and profits of the said manors, &c., for his own proper use and benefit, during the life of the parent, as if such parent were dead; And, that in case no such issue male, entitled as aforesaid, shall be in existence, then during the vacancy or contingency of such issue male, the person next entitled for the time being, under the limitations aforesaid, to a vested remainder in the said manors, &c., expectant on the decease of such tenant for life, and such failure of issue male of his body, shall and may be entitled to the said rents and profits for his own proper use and benefit, But without any exclusion of or prejudice to the estate, interest or right of any such issue male, but only from the time of the birth of such issue male respectively.

PROVIDED ALWAYS, and I declare my will to be, that the *cesser* or determination of the estate of any person, by virtue of or under any of the provisoes hereinbefore contained, shall not in any wise prejudice or affect any such jointure

or jointures, portion or portions, or the term or terms of years, remedies and securities for the same,\* respectively. lease or leases, or demise or demises as before such *cesser* or determination shall have been limited, [settled, appointed or created, of and in the said manors, &c.,] by this my will devised, or any of them pursuant to, and by virtue of, the powers in this my will respectively contained.

CHAP. III.  
SEC. II.

PROVIDED ALWAYS, and I do hereby declare, &c., that it shall and may be lawful, to and for the several persons hereby respectively made tenants for life, as and when, and by virtue of the limitations hereinbefore contained, or any proviso in this my will, they shall successively and respectively be in the actual possession, or entitled to the receipt of the rents, issues and profits of the said manors &c., hereinbefore devised or expressed, and intended so to be, either before or after their respective marriages with any woman or women, with whom they may respectively intermarry, by any deed, &c., or by their respective last wills &c. (but subject and without prejudice to the said term of 1000 years, and the trusts hereinbefore declared of the same, or such of them as shall be subsisting), to grant, limit and APPOINT UNTO and to the use of or in trust for any WOMAN or women, to whom they respectively may be married at the time of my decease, or whom they respectively shall or may afterwards marry, for her or their life or lives, and for her and their JOINTURE or jointures, and in bar, or without being in bar, of her or their dower, any annual sum or sums of money, yearly rent-charge, or yearly rent-charges, not exceeding, in the whole, the sum of £—— by the year, for any such woman, tax-free, and without any deduction, to commence and take effect immediately after the decease of the person making such grant, limitation and appointment, and to be issuing and payable out of, and charged and chargeable upon, all or any part or parts of the said manors, &c., hereby devised, together with such POWERS and remedies for recovering the same, when in arrear, and for defraying all costs and expenses,

Powers for tenants for life to jointure.

CHAP. III.  
SEC. II.

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occasioned by the non-payment thereof, as to the person making such grant, limitation and appointment, shall seem meet, AND also to grant, demise, limit or appoint, all or any of the same manors, &c., to any person or persons, for any term or terms of years, to take effect immediately after the decease of the person making such grant, limitation or appointment, upon the usual trusts for better securing the due payment of the rent-charge so to be granted, limited or appointed as aforesaid, so as such term or terms of years, be made determinable (without prejudice to any disposition which may have been made under the trusts to be declared thereof, as aforesaid), on the ceasing of the rent-charge or rent-charges thereby secured, and the payment of all arrears thereof, and of all costs, charges and expenses, occasioned by the non-payment thereof.

Limitation of  
the total  
amount of jointures.

PROVIDED ALSO, and I do hereby further declare my will and mind to be, that the said manors, &c., hereby devised, shall not, under or virtue of the power hereinbefore contained, be at any one time subject or liable to the payment of any annual sum or sums by way of jointure, exceeding, in the whole, the sum of £—, of lawful money of Great Britain, so that, if, under the power of jointuring, hereinbefore contained, the said manors, &c., or any part or parts thereof, would, in case this present proviso had not been inserted, be charged with a greater annual sum for jointure, in the whole, than the said annual sum of £—, the payment of the annual sum or sums by reason of the charging or granting whereof such excess shall have been occasioned, or such part thereof as shall occasion the same, shall, during the time of such excess, be suspended.

Powers to raise portions.

PROVIDED ALSO, and I do hereby declare my will and mind to be, that it shall and may be lawful, to and for the several persons hereby respectively made tenants for life, when and as by virtue of or under the limitations hereinbefore contained, or any proviso in this my will, they shall respectively be in the actual possession or entitled to the

receipt of the rent, &c., of the said manors, &c., by any deed, &c., or by their respective last wills, &c., (but subject and without prejudice as aforesaid) to grant, demise, LIMIT or appoint, ALL or any part or parts of the said manors, &c.; with their appurtenances, (EXCEPT the capital messuages or mansion houses at &c., and the parks and pleasure-grounds thereto respectively adjoining or belonging,) unto any person or persons, for any TERM or number of years, without impeachment of waste, to commence from the death of the person making such grant, demise, limitation or appointment, UPON TRUST, by sale or mortgage of the hereditaments so to be granted, demised, limited or appointed, or any part thereof, for all or any part of such term or number of years, or by and out of the rents, issues and profits thereof, or by all or any of the said ways and means, or by any other reasonable ways and means, TO RAISE and levy for the portion or PORTIONS of all and every, or any of the child or children of the person making such grant, demise, &c., by any wife or wives, to whom they respectively shall be married at my decease, or whom they respectively shall afterwards marry, ANY sum or sums of money, not exceeding, in the whole, the sum of £——, the same to be PAID to sons at the age of twenty-one years, and to daughters at the like age or day of marriage, which shall first happen, WITH SUCH MAINTENANCE, in the mean time, from the death of the person respectively making such grant, &c., not exceeding the interest of such portion or portions, at the rate of 5 per cent. per annum, as to such person shall seem meet, and as shall be expressed in such deed or deeds, or will or codicil.

PROVIDED ALWAYS, and I do hereby &c., that the here- Limitation of  
ditaments so to be granted, &c., for raising portions, as the total  
aforesaid, shall not, under &c., of the power last herein-amount of por-  
fore contained, be liable to the payment of any larger sum tions.  
or sums of money, for portions, than the sum of £—— in  
the whole, nor to the payment of any further sum or sums of  
money for maintenance, than shall, in the whole, be equal to



CHAP. III.  
SEC. II.

the interest of the said sum of £—, at the rate of 5 per cent. per annum, any thing hereinbefore contained to the contrary thereof, &c.

Power of leasing to tenants for life.

PROVIDED ALWAYS, and I do &c., that it shall and may be lawful, to and for the said several persons hereby respectively made tenants for life, as and when, by virtue of the limitations hereinbefore contained, or any proviso in this my will, they shall successively and respectively be in the actual possession, or entitled to the receipt of the rents, issues and profits of the said manors &c., hereby devised, and as and when they shall have attained the age of twenty-one years, AND also TO and for the said [*trustees to preserve*], and the survivor, &c., from time to time, and at all times during the minority of any such tenant for life, respectively, and also during the minority of any child or children, who, by virtue of any of the limitations aforesaid, shall be entitled to any estate of freehold and inheritance, of and in the said manors &c., by any indenture or indentures to be sealed and delivered by them, respectively, in the presence of &c., TO LIMIT or appoint, by way of DEMISE, or lease, all or any part or parts of the said manors, (except the said capital messuage or mansion-house, at —, &c.) and other hereditaments with the appurtenances, to any person or persons, for any term or number of years absolute, not exceeding twenty-one years, &c.

Power of sale, the purchase-money to go upon the trusts of the personal estate.

PROVIDED ALWAYS, and my will is, that it shall be lawful, for my said trustees and the survivors and survivor of them, his heirs or assigns, if they or he shall think fit, at any time after —, absolutely to sell and dispose of all my said —, either together or in parcels, and by public sale or private contract, unto any person or persons whomsoever, for the best price or prices, in money, that can or may be reasonably obtained for the same, and, in the event of any such sale or sales, the money or monies to arise therefrom, shall be laid out and invested in the names or name of my trustees or trustee for the time being, in the purchase of parliamentary stocks, or public funds of Great

Britain, or at interest upon real security in England, to be from time to time altered, varied and transposed, as they or he shall think fit. And I do hereby declare my mind to be, that my trustees or trustee, in whose names or name such last mentioned investments shall be made, their or his executors, administrators or assigns, do and shall stand and be possessed of and interested in the same, and the monies placed or secured thereon, Upon and for the same trusts, intents and purposes, as are hereinbefore expressed with respect to the residue of my personal estate, and the monies to arise therefrom, and the stocks, funds or securities, in or upon which the same shall be laid out or invested as aforesaid, or such of them, as shall be subsisting, or capable of taking effect.

PROVIDED ALWAYS, and I do, &c., that it shall and may be lawful, to and for the said [*trustees to preserve*], and the survivors, &c., at any time or times after my decease, at the request, and by the direction of any person who, for the time being, under the limitations hereinbefore contained, or any proviso in this my will, shall be in the actual possession, &c. &c., as tenant for life, or tenant in tail-male, by purchase, at law, or in equity, and who shall have attained the age of twenty-one years, (such request and direction to be testified by some writing under his hand and seal, attested by two or more credible witnesses,) to CONVEY IN EXCHANGE for or in lieu of other manors, lands or hereditaments, to be situate, &c., or in the principality of Wales, all or any part of the said hereditaments and premises hereby devised or expressed, &c., (except my said capital messuage, &c.,) to any person or &c., Yet so as such purchase or purchases, respectively, be made with the consent, in writing, of the person who would, under, &c., of the limitations hereinbefore contained, or any of them, be tenant for life, or tenant in tail-male in possession, of and in the hereditaments so to be purchased, if such persons shall then have attained the age of twenty-one years, BUT IF such person shall be then under the age of twenty-one years, then, at the discre-

Power of exchange.

CHAP. III.  
SEC. II.

tion, and of the proper authority of the said [*trustees to preserve*], or the survivor, &c.

AND MOREOVER, that they, the said [*trustees to preserve*], or the survivor &c., DO and SHALL SETTLE and assure, or cause to be settled and assured, the manors, &c., to be vested in them the said [*trustees to preserve*] or the survivor, &c., in exchange, as hereinbefore is mentioned, And also the hereditaments so to be purchased, as aforesaid, To such, and the same uses, Upon such, and the same trusts, and for such and the same intents and purposes, and with, under, and subject to such and the same powers, provisions, conditions and agreements, as are in and by this my will, limited, expressed, declared and contained of and concerning the hereditaments and premises hereby demised or expressed, and intended so to be, or as near thereto as the deaths of parties and intervening accidents will then admit of.

AND FURTHER, that until the money to be received for equality of exchange, as aforesaid, shall be disposed of in the manner hereinbefore mentioned, it shall and may be lawful, to and for the said [*trustees to preserve*], and the survivor, &c., by and with such consent as last hereinbefore is mentioned, or at their or his discretion, as the case may be, TO PLACE OUT such sum or sums of money at interest, either in the parliamentary stocks, or public funds, or upon government, or real securities, in the names or name of such trustees or trustee, for the time being, and TO ALTER, vary, transfer and dispose of the said stocks, funds and securities, as occasion shall require. AND I do hereby further declare, that the interest, dividends and annual produce arising from such stocks, funds or securities, shall go and be paid to such person or persons, and be applied to and for such uses, intents and purposes, and in such manner, as the rents, &c., of the said manors and hereditaments to be purchased therewith, would go or be payable or applicable in case such purchase or purchases, and settlement as aforesaid, were then actually made.

Devise of  
copyholds

I give and devise ALL the copyhold or customary messuages, farms, lands, tenements and hereditaments, in

England, Ireland, or elsewhere, of or to which I or any person or persons, In trust for me, am, is or are seised or entitled for an estate of inheritance in possession, remainder, reversion or expectancy, or which I have power, by this my will, to dispose of, in possession, reversion, remainder or expectancy, with their and every of their appurtenances, and all my estate, right, title and interest therein respectively, (But subject to the preceding estates or interests therein, respectively, as to such of the same premises as are subject to any estate or interest, estates or interests, preceding the estate or interest I have power to dispose of by this my will,) unto the said [*trustees to preserve*], and their heirs, Upon and for such trusts, intents and purposes, and with, under and subject to such powers, provisoes and declarations, as shall or may as nearly correspond with and be similar to the uses, trusts, intents and purposes, powers, provisoes and declarations hereinbefore limited, expressed and declared of or concerning the freehold hereditaments hereinbefore devised, or intended so to be, as the different natures and tenures of the same premises, respectively, and the rules of law and equity will admit of.

CHAP. III.  
SEC. II.

upon the same trusts as the freehold.

I give, devise and bequeath all the messuages, farms, lands, tenements and hereditaments, in England, Ireland, or elsewhere, of or to which I, or any person or persons, In trust for me, and is or are seised or entitled in possession, remainder, reversion or expectancy, for the life or lives of any person or persons, under or by virtue of any lease or leases, or otherwise howsoever, or which I have power, by this my will, to dispose of in possession, remainder, reversion or expectancy, for the life or lives of any person or persons; AND also all the messuages, farms, lands, tenements and hereditaments in England, Ireland, or elsewhere, of or to which I or any person or persons, In trust for me, am, is or are, or, at the time of my decease, may be possessed, or entitled, in possession, remainder, reversion or expectancy, for any term or terms of years, either absolute or

Devise of leasehold upon trusts after declared.

CHAP. III.  
SEC. II.

determinable on any life or lives, under any lease or leases, or otherwise howsoever, or which I have power, by this my will, to dispose of, in possession, remainder, reversion or expectancy, for any term or terms of years, either absolute or determinable on any life or lives, and any estate and interest therein respectively, which, at the time of my decease, I shall have in any of the said hereditaments holden under any lease or leases for years, UNTO and to the use of the said [*trustees to preserve*], their heirs, executors, administrators and assigns, respectively, according to the nature and quality of the same premises respectively, nevertheless, UPON the trusts, and for the intents, &c., and with, &c., hereinafter declared and contained, or referred to, of and concerning the same respectively, (that is to say)

Declaration of  
the trusts of  
the leasehold.

UPON TRUST, in the first place, that they, the said [*trustees to preserve*], and the survivor, &c., and the heirs, &c. of such survivor, do and shall, by and out of the rents, &c., thereof, yearly and every year, and at all other times, duly pay, satisfy and perform the several rents, reservations, covenants and agreements, which are reserved and contained in any lease or leases, which, at the time of my decease, shall be subsisting of or in the same premises respectively, or which, in and by any lease or leases thereof, to be from time to time renewed and taken, shall be reserved and contained, on the part of the lessees to be paid or performed;

And upon this further trust, that they, the said [*trustees to preserve*], and the survivor, &c., and the heirs, &c. of such survivor, do and shall, from time to time, use their or his endeavours to RENEW the subsisting lease or leases for the time being, of such of the same premises, as are or shall be held under any lease or leases for lives or years, usually renewable, when and as often as any of the lives, for which the same respectively are or shall be granted or held, drop, or the usual course of renewal of such leases respectively shall require; AND do and shall raise and pay the fines and other charges and expenses of such renewal or

renewals, by and out of the rent, &c., of the same premises or by mortgage thereof;

CHAP. III.  
SEC. II.

AND I hereby declare, &c., that, subject to the aforesaid trusts for renewal, the said [*trustees to preserve*], and the survivor, &c., and the heirs &c., respectively, of such survivor, shall stand and be possessed of, and interested in, the said hereditaments, last hereinbefore devised and bequeathed; or expressed and intended so to be,

UPON and for such trusts, intents, &c., and with &c., as the different natures and qualities of the estates in the same premises, respectively, and the rules of law and equity will admit of;

YET, so that no part of such of the same hereditaments, as are or shall be holden for any term or terms of years absolute, or for any term or terms of years determinable upon any life or lives, shall vest absolutely in any person or persons who shall be tenant in tail-male, by purchase of the said fee simple hereditaments hereinbefore devised or expressed, &c., under any devise or limitation in this my will, unless such person shall attain the age of twenty-one years, or shall die under that age leaving issue male living at his decease, or born in due time after;

And I declare it to be my particular wish and desire Family that my capital messuage or mansion house at —, may residence. be the principal place of residence of the person, for the time being, entitled under the limitations hereinbefore contained;

I give and bequeath all my pictures, prints, books, Bequest of jewels, plate, china, household goods and furniture, and pictures, books, other chattels and effects, which at my decease shall be in furniture, &c. or about my capital messuages or mansion-houses, at — and — aforesaid, unto the said [*trustees to preserve*], their executors, administrators and assigns;

IN TRUST to permit the same to go along with, and to be used and enjoyed, so far as the rules of law and equity will permit, by the person who, under or by virtue of the

CHAP. III.  
SEC. II.

limitations hereinbefore contained, or any proviso in this my will, shall, for the time being, be in the actual possession, or, entitled to the receipt of the rents, &c., of my said manors, &c., hereby devised ;

YET SO THAT the same shall NOT VEST absolutely in any person hereby made tenant in tail by purchase of my said manors, &c., UNLESS such person shall attain the age of twenty-one years, or die under that age, leaving issue male of his body living at his decease, or born in due time after ;

Directions for  
the preparation  
of an inventory.

AND I direct that an INVENTORY shall be made of the said pictures, prints, books, jewels, plate, china, household goods and furniture, and other chattels and effects, as soon as may be after my decease ; AND that two copies shall be made of the same, and each of them shall be signed by the person, for the time being, in possession, under the limitations aforesaid, and by the trustees or trustee, for the time being, of this my will ; AND that the said trustees and trustee, for the time being, shall see that the said pictures, prints, books, &c., are properly preserved at the expense of the usufructuary thereof for the time being, BUT, nevertheless, the fashion and form of the said plate and jewels may, from time to time, be altered, the intrinsic value thereof being kept up ;

The plate and  
jewels to be  
re-fashioned,  
&c.

Bequest of re-  
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pointment of  
executors.

And I do hereby give and bequeath unto my said son, &c., his executors, administrators and assigns, all the rest and RESIDUE of my personal estate whatsoever, &c., not hereinbefore specifically disposed of, and which shall remain after payment of my debts, legacies, funeral and testamentary expenses ; And I do hereby nominate and appoint executors of this my will,

Provision for  
appointment  
of new trus-  
tees.

PROVIDED ALSO, and I do hereby declare, &c., that if the said trustees hereby appointed, or any of them, or any trustee or trustees to be appointed as hereafter is mentioned, shall depart this life &c. &c., THEN, and so often as it shall so happen, it shall be lawful for the surviving or continuing

trustees or trustee of the trust-estate, monies and premises, the trustee or trustees whereof shall so depart this life &c.&c., or become incapable to act as aforesaid, or the executors or administrators of the last surviving or continuing trustee, with the consent of the person, who, under the limitations hereinbefore contained, shall, for the time being, be tenant for life, or tenant in tail male by purchase, in possession of the said capital messuages, &c., hereinbefore devised, if such person shall be of the age of twenty-one years, (such consent to be signified by some writing under his hand and seal) but if such person shall be under the age &c., OR in case there shall not be any such person, THEN, at the proper discretion and authority of such surviving or continuing trustees or trustee, or of the executors, &c., BY any deed or instrument, in writing, &c., to appoint one or more person or persons, to be a trustee or trustees, in the room of the trustee or trustees so dying or desiring to be discharged or &c. as aforesaid, AND that, upon every such appointment, the manors and premises which shall be then vested in the trustee or trustees so dying &c., as aforesaid, either solely or jointly with surviving or continuing trustees or trustee, shall be conveyed, assigned and transferred, so and in such manner that the same may become vested in the new trustee or trustees, jointly with the surviving or continuing trustees or trustee, or solely as occasion shall require ; AND every such new trustee shall have such and the same powers and authorities, and discretion, to all intents and purposes whatsoever, as if he had been originally nominated a trustee in this my will :

PROVIDED ALSO, and I do hereby declare, that the said several trustees hereby nominated, &c., (*indemnity of trustees and for re-imbursement*) ;

I bequeath to \_\_\_\_\_, his executors, administra- Bequest by  
tors or assigns, the sum of £ \_\_\_\_\_, And I hereby codicil.  
republish my will and declare this codicil to be a part  
thereof. \_\_\_\_\_ IN WITNESS, &c.



## CHAPTER. IV

### OF COPYHOLDS.

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1. *Deed of covenants on the purchase of copyhold lands.*
  2. *Deed of covenants on the mortgage of copyhold lands.*
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### SECTION I.

#### *Of deed of covenants on the purchase of copyhold lands.*

Reason for  
having a deed  
of covenant.

Since, in general, the custom of manors does not permit the covenants for title to be contained in the surrender, it is the practice to have a deed to accompany the surrender, by which, after reciting the contract, the vendor, in consideration of the price, covenants that he or his trustee will surrender the purchased lands to the purchaser, or to a trustee for him as may be agreed on. And by this deed the vendor covenants, that he is seised of the premises of and in a good estate of inheritance in possession, according to the custom of the manor,—that he hath power to surrender,—for peaceable possession,—free from incumbrances, (except the

rents and services due to the lord of the manor),—and for further assurance.

CHAP. IV.  
SEC. I.

The deed of covenant is sometimes precedent, and sometimes subsequent, to the surrender, which is then recited in it.

Where copyhold lands, comprised in one surrender, are purchased in lots, they may be surrendered to trustees, as to the different lots, upon such trusts as the respective purchasers shall appoint, or in trust for them, their heirs “sequels in right,”(1) and assigns for ever, —the accompanying deed containing a set of covenants from the vendor with each purchaser, or one set of covenants with the trustees.

Copyhold sold in lots.

Copyhold lands, being always subject to a rent to the lord, when they are sold in parcels to different purchasers, the rent should be apportioned by an agreement at the end of the deed of covenants.

If there be any deeds which relate to the surrendered lands, the person in whose custody they are to remain must covenant for their production. It seems to be unnecessary to include office copies of surrenders and admittances in such covenants, as other copies (the copy and not the original being the evidence by which the lands are held,) may, at any time, be had from the steward, and are good evidence, though he were not the steward at the time the surrenders were passed.

Covenant for production of deeds,

In the county of Durham, copyhold lands may be surrendered to trustees upon such trusts as the copyholder shall by deed appoint. In this case, on a sale, it is proper to exercise that power by the deed of covenants, and to take a surrender also ; but, if the power of

Custom of copyhold in the County of Durham.

(1) Whether these words are to be used or not will depend on the custom of the manor.

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CHAP. IV.  
SEC. I.

appointment should not be exercised, the surrender, (which has, in many respects, the operation of a fine) would extinguish the power, and vest a good title in the purchaser.

**Incumbrances.** If there be mortgagees, legatees, annuitants or other incumbrancers, who are paid off out of the purchase-money, they ought to join in the surrender, as evidence that they have been paid off, and, for the same reason, the executor of a mortgagee of copyhold lands, ought on all occasions, when the money is paid off, to join in the surrender with the heir. As the legal estate of copyhold lands vested in a trustee, or mortgagee, cannot be devised, it generally vests in the heir; but, if there be any particular inconvenience, which would result from suffering it thus to descend, a mortgagee may surrender to trustees, in trust, on payment of mortgage-money and interest, to convey to the owner, and such trustees may surrender to new ones.

Copyholds  
within 6 Geo.  
4.

Copyholds are within the statute of the 6. Geo. 4, c. 74, and, therefore, an infant trustee, in whom such property is vested, will, on application to a court of equity, be ordered to convey.

Right in copy-  
holds may be  
released.

A right in copyhold lands may be released, particularly an equitable one. Thus, if lands be surrendered to trustees, in trust to be sold, and the money to be divided among several persons; after the trustees have surrendered, the persons entitled to the money may "remise, release and for ever quit claim, all their estate "right, title, &c.," to the purchaser or his trustees.

The equitable  
estate in copy-  
holds may be  
released.

If lands are surrendered to trustees, in trust for a person, and the trustees surrender the legal estate by the direction of their *cestui que trust*, the latter may release his right and title to the surrenderee.

In some manors the copyholder surrenders in court, in others before the steward out of court, in others into the hands of two copyholders of the manor, who present the surrender at the following court. In some manors the copyholder may surrender by power of attorney, in others the steward can grant a deputation to some person to take a surrender in his place. In most manors, the surrender, in whatever mode it is taken, is presented to, and found by, the homage or jury, and an admittance, which is a separate instrument which recites that fact, is made out by the steward thereupon.

In the county of Durham the copyholder has an estate of inheritance (not at the will of the lord, but) according to the custom of the manor, and the surrender and admittance are contained in the same instrument; and, to enable a copyholder to dispose of his estate by will, it is necessary that the legal estate should be vested, not in himself, but in some other person, in trust for him, and he cannot surrender into the hands of the lord "to such uses as he shall declare by will" as is the custom in some manors.

Copyholds are not liable to be extended, are not subject to debts of any kind, and, not being within the Statute of Fraud, they pass, by a will, unattested. In some manors they cannot be entailed, in others limitations in tail are allowed, and may be barred by surrender by a recovery in the lord's court, or by the copyholder making a feoffment so as to commit a voluntary forfeiture, on which the lord seizes the land and re-grants it to him in fee. Such of these modes of barring the entail as are authorized by the court, (or if two of

Custom of  
copyholds in  
County of Dur-  
ham.

Copyholds can-  
not be exten-  
ded, &c.

them be concurrent, then that which is most ancient) should be adopted.

In deeds of covenant to surrender copyhold land, it is usual to insert the same recitals as would have been necessary if the premises were freehold. If there be any annuity or legacies which continue a charge upon and are to be raised out of the purchased premises, or any long trusts are necessary, the lands may, by a memorandum (or defeazance as it is usually, though improperly, called) at the end of the surrender, be declared "to be surrendered to, and vested in the trustees, upon such trusts as are declared by a deed of equal date,"—but this is not a good plan, because, if the deed should be lost, an insuperable objection to the title may arise; it would, therefore, be a better mode, where the trusts are long, to declare the most important of them in the memorandum, as, for instance, the trust for sale,—and refer to the deed for the others, as for instance, the application of the money.

It is not an uncommon practice for copyholders, when they mortgage their land, for the purpose of keeping the transaction secret, to surrender to the mortgagee or to trustees for him [*the mortgagee*] upon the trusts of a deed of equal date, which contains a proviso for redemption, and trusts to raise the money by mortgage or sale. This practice cannot be recommended as good either for the mortgagor or mortgagee, since the loss of the deed may endanger the money of the one, or the estate of the other.

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## SECTION II.

*Of the deed of covenants on the mortgage of copyholds.*

Copyhold lands may be surrendered by way of mortgage, subject to the usual proviso for redemption, which may be contained in the surrender, or in a memorandum or defeazance under it, according to the custom of the manor; but as there cannot be, in the surrender, covenants for the payment of the money and for title, it is usual to have a deed of covenants accompanying the surrender, which may be either precedent or subsequent to it, as has been already mentioned. Such deed, after a covenant to surrender, if precedent, and a recital of the surrender, if subsequent, must contain a covenant for payment of the money and the other usual covenants entered into by mortgagors for the title. Both on the purchase and mortgage of copyhold lands, there is a variation from the covenants applicable to freehold lands, for no copyholder can be said to be seised "of an estate in fee simple in possession," but only "of an estate of inheritance, according to the custom of the manor;" and if the legal estate be vested in the lord, as is the case in pure copyholds, the tenant on the roll cannot be said to be seised of an estate at all, but only "entitled according to the custom of the manor."

After the covenant, that he is seised or entitled, as the case may be, follow the usual covenants, that he has power to surrender, for peaceable possession, and free from incumbrances; but there is a distinction in this last covenant from the corresponding one of freeholds,

General plan  
of the mortgage  
of copyholds.

Covenants on  
mortgage of copyholds.

CHAP. IV.  
SEC. II.

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the words "jointures, dowers, uses, statutes, recognizances, judgments, extents, and actions," being omitted in deeds of covenant applicable to such copyholds as are not susceptible of limitations to uses, and not subject to dower; in many cases, the widow has an estate of free-bench by custom, but no copyhold lands are liable to be affected by "statutes, recognizances, judgments, extents or executions," or, in other words, no copyholds are liable to be extended under an *elegit*, or any statute merchant or staple.

As certain copyholds may be limited to uses, and may be subject to dower, those words (as well, indeed, as any of the others above enumerated which are not inapplicable) should be retained.

Term cannot  
be created of  
copyholds.

A term of years cannot be created of copyhold lands, unless warranted by the custom of the manor; the whole interest, therefore, of the copyholder must, on mortgage, be transferred to the mortgagee, or to trustees for him, and the money must be secured, either under the common proviso for redemption, or by a trust to the mortgagee to sell. In either case, deeds to charge further sums lent, must be prepared in the same manner as if the property were freehold.

Where economy is an object, the deed of covenants may be dispensed with, and a bond may be taken for the payment of the mortgage-money and interest, in which case it should be stated to be the same sum secured by the surrender.

In some respects, copyholds are a better security for money lent, than freeholds, because the surrender being entered on the roll, is notice of the mortgage to all persons.

For reasons, already stated, it is improper, on a mort-



gage of copyhold lands, to surrender them, upon the trusts of a deed of equal date, containing the proviso for redemption.

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## CHAPTER V.

### OF MORTGAGES.

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1. *Of mortgage by way of demise, and of the transfer thereof.*
  2. *Of mortgages in fee, and of the transfer thereof.*
  3. *Of mortgages of leasehold for lives and years.*
  4. *Of the mortgage of West Indian property.*
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#### SECTION I.

##### *Of mortgage by way of demise, and of the transfer thereof.*

When a sum of money is borrowed, on the security of an estate of much greater value, such mortgage is very often made by demise for a term of years, in which no recitals are necessary, except that the money has been agreed to be lent, in consideration of which the mortgagor "grants, bargains, sells and demises the lands, "together with, &c., and the reversion, &c.;" but the words "and all the estate, &c." must be omitted; *habendum* to the mortgagee, his executors, &c. for a certain term, subject to a proviso, that, on payment of principal

General form  
of a mortgage  
by demise.

CHAP. V.  
SEC. I.

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and interest on a certain day, the term shall cease and be void. If the money be actually paid at the time limited, or previous to it, the term, of course, becomes void; but to authenticate this fact, a receipt should be indorsed on the deed, and the witnesses should not only attest the signing, but also the payment of the money, and that it was paid on the day. Where the property is considerable, however, the term should be surrendered, in order that no question may afterwards arise as to the *cesser* of it.

Advantage of  
mortgage by  
demise.

In one respect, a mortgage by way of demise is better than a mortgage in fee, since no inconvenience can arise from want of an heir-at-law to the mortgagee, a circumstance which, in the latter security, frequently occasions considerable difficulty and expense to the mortgagor, whereas, in the case of a term, if the mortgagee has made no will, an administration may be had, and the mortgage-money paid to the person who has to re-convey the estate.

In a demise by way of mortgage, the mortgagor covenants for payment of the money,—that he has power to demise,—for peaceable enjoyment after default in payment,—and that free from incumbrances,—and for further assurance after default,—with a declaration that, until default be made in payment, the mortgagor shall hold the premises.

Mortgage of  
a long term.

Where an estate, held by a lease for a long term of years, is to be mortgaged, and there appears to be any difficulty in deducing the title through all the *mesne* assignments, it is proper to take a demise from the mortgagor to a trustee for the mortgagee, for a term somewhat less than the unexpired residue of the original lease, in the same manner as if the former were seised in fee (though the covenant to that effect should be

omitted): this is done the better to enable the mortgagee to recover possession of the mortgaged premises, by ejectment, should that be necessary; for as the law presumes every person to be seised in fee, the mortgagor's being in possession and the execution of the demise are all that are necessary to be proved as against him, and all persons claiming under him, whereas, if there were an assignment only of the long leaseholds, it might be difficult to deduce the title to the mortgagee, before a jury.

CHAP. V  
SEC. I.

In the transfer of mortgages for terms, the original demise must be recited, and notice taken that the money is still due, and that the first mortgagee having occasion for it, the new mortgagee hath agreed to lend the same: the former mortgagee must then, in consideration of the said sum, "bargain, sell, assign, transfer and set over" the premises to the new mortgagee, his executors, &c., *habendum* for the residue of that term, subject to a proviso, that, on payment of the principal on a given day, with interest, the new mortgagee will surrender the term to the mortgagor, his heirs or assigns, or assign it to such persons as he or they shall appoint.

Transfer of  
mortgage by  
demise.

When, on the transfer of a mortgage, a further sum is advanced by the second mortgagee, it is usual to change the mortgage for a term, into a mortgage in fee. In such a transaction the parties should be the mortgagor of the first part,—the mortgagee of the term of the second part,—and the intended mortgagee of the third part. The demise must be recited, and the usual recitals inserted,—that the money is due,—that payment has been required,—and that the new mortgagee has agreed to lend such a sum to enable the mortgagor to pay off the former debt, and to supply his present occasions; in consideration whereof, the

Conversion of  
a mortgage by  
demise to a  
mortgage in  
fee on a further  
advance by a  
new mortgagee.

CHAP. V.  
SEC. I.

mortgagor must "grant, bargain, sell, &c.," and mortgagee for the term may either "bargain and sell, &c.," or he may "assign and surrender" to the new mortgagee, his heirs and assigns, ALL, &c., *habendum* unto and to the use of the new mortgagee in fee, subject to the usual proviso of redemption; and the mortgagor must enter into the same covenants as upon a common mortgage in fee, in which the term need not be excepted as an incumbrance, but the mortgagee for the term must covenant that he has done no act to encumber.

Where the  
mortgagor is  
not a party.

If the mortgagor be not a party to the transfer, then the lands must be assigned to the new mortgagee, for the residue of the term, subject to such right and equity of redemption, on payment to him, his executors, &c. of the principal and interest, as, by virtue of the demise, were subsisting of and concerning the premises; and the principal money and interest must be assigned to the new mortgagee, with a covenant that the former mortgagee has done no act to encumber the premises, and that he has not before "received, released, assigned or charged the principal sum and interest."

The money is assigned in order that the new mortgagee may stand in the place of the old mortgagee, and be entitled to take the same methods for recovering it as the latter might have done.

Conversion of  
a mortgage  
by demise, to a  
mortgage in  
fee on the ad-  
vance of a  
further sum by  
the first mort-  
gagee.

Where, on the advance of a further sum of money by the mortgagee for the term, the mortgage for a term is to be converted into a mortgage in fee, the mortgagor and mortgagee must join "according to their respective rights and interests" in conveying to a trustee to the use of a mortgagee in fee, subject to the usual proviso for redemption. By thus uniting the term and the fee, the former will merge in the latter; but if the term is

to be kept on foot, the mortgagee may, *before he takes the conveyance of the fee*, assign the term to a trustee, "in trust for better securing the mortgage money and interest, and, subject thereto, In trust for the mortgagor." By this means, if there be any judgments or secret incumbrances made by the mortgagor, subsequent to making the demise, and previous to the mortgage in fee, the term will protect the inheritance against them.

When two persons lend money on the mortgage of an estate, the whole may be conveyed to a trustee, as to one moiety, To the use of one mortgagee, his executors, &c. for a term of years; and as to the other moiety, To the use of the other mortgagee, his executors, &c. for a different term, with two provisoes and sets of covenants applicable to each term. Or if an estate is already in mortgage for a term, and the money is to be advanced by two persons equally on a transfer of the security, one moiety of the premises may be assigned to one mortgagee, with the usual proviso for redemption and covenants, and the other moiety may afterwards be assigned to the other mortgagee in the same way.

## SECTION II.

### *Of mortgages in fee, and of the transfer thereof.*

Where there is no preceding mortgage, or outstanding estate, any recital is unnecessary, except that the mortgagee has agreed to lend the mortgagor a sum of money, on the security of the lands, &c. after-mentioned, which

General form  
of mortgage  
in fee.

CHAP. V.  
SEC. II.

are then conveyed unto and to the use of the mortgagee in fee, with a proviso that, on payment of the mortgage money and interest, on a certain day, the premises shall be re-conveyed to the mortgagor, his heirs and assigns, or as he or they shall direct and appoint,—which is more proper than directing that, on payment of the money, the deed shall be void. The mortgagor covenants for payment of principal and interest, and also enters into covenants for title,—for further assurance in default of payment on the day limited,—and that, until such default, the mortgagor shall quietly enjoy.

If the principal and interest are not paid on that day, the estate, at law, becomes forfeited; but, in equity, the mortgagee is obliged to re-convey to the mortgagor, on payment of principal and interest.

Estate of the  
mortgagee.

If a mortgagee recover possession by ejectment, as he may do at any time after the day fixed in the proviso for redemption has elapsed, and continue in the possession and receipt of the rents for twenty years or more, and no account be settled, or any other act done in that period to keep the equity of redemption open, the estate, whatever may be its value, is forfeited to the mortgagee, and becomes real estate in him. As it may be doubtful, in some cases, whether a mortgage so circumstanced, is to be considered as real or personal estate, and the mortgagee may want to make his will, it would be proper to devise it as real estate, with a declaration, that if it shall be determined to be personal estate, the money shall go to the devisee in lieu of the land (1).

(1) This declaration, however, lies open to the objection, that it might be construed to be tantamount to an acknowledgment, that the mortgagor has still a right to come in and redeem.

A mortgagee may make use of all his remedies simultaneously (that is to say),—he may bring an action at law for the mortgage-money upon the covenants,—an ejectment, to recover possession of the estate,—and may file a bill to foreclose the mortgagor, at the same time.

CHAP. V.  
SEC. II.

Mortgagee's remedies.

Where a mortgage in fee is to be transferred, with the concurrence of the mortgagor, he and the old mortgagee convey to the new mortgagee, with a new proviso for redemption,—a covenant from the old mortgagee that he has done no act to encumber,—and the same covenants from the mortgagor as upon an original mortgage. But if the mortgagor is not a party to the deed, then, as no new proviso for redemption can be inserted in it, the lands must be conveyed by the old mortgagee to the new mortgagee, *habendum* “unto and to the use of him, his heirs and assigns for ever, subject to such right and equity of redemption, on payment to the latter, his executors, &c. of the principal and interest, as by virtue of the original mortgage were subsisting concerning the premises,” and the old mortgagee must assign the money to the new mortgagee, with a covenant that he has done no act to encumber the premises, and that “he has not received, released, assigned or encumbered the mortgage-money or interest.”

Transfer of a mortgage in fee.

If an estate be mortgaged a second time, the first security should be stated, and the second made subject to it, for otherwise, by the 4th and 5th William and Mary, c. 16, the mortgagor would forfeit his equity of redemption (1).

Recital in second mortgage.

All second mortgages should contain a declaration, on the part of the mortgagor, that on payment of the

Declaration necessary in a second mortgage.

(1) This statute, in practice, is very rarely attended to, though it cannot be considered to be quite obsolete.

CHAP. V.  
SEC. II.

principal and interest to the first mortgagee, he shall convey to or in trust for the second mortgagee, by way of better securing his loan, and the first mortgagee should either execute or have notice in writing (of which a duplicate must be preserved) of the second mortgage, in order that if he should make any further advance on the security, he may be postponed to the second mortgagee.

Further advance by first mortgagee.

If the mortgagee advance an additional sum to the mortgagor, then, as he has already an estate in fee vested in him, any further conveyance is unnecessary; but a deed is prepared, by which, after reciting the security, and taking notice that the money is due, and acknowledging the receipt of the further sum advanced, the mortgagor covenants that the mortgaged premises shall thenceforth be a security, as well for the sum lent, in the first instance, as for the further advance now made, and also that he will pay the sum now lent, and interest; and there must be, on the part of the mortgagor, a declaration that the premises shall not be redeemed or redeemable, till, both sums, and all interest thereon, shall have been fully discharged.

Mortgages with trusts for sale, when proper.

Where the sum advanced is near the value of the estate, or where the security is leasehold for lives, or an advowson, &c., or it is expected that the interest may not be punctually paid, or that there may be some difficulty in getting back the principal, the practice is to create a mortgage in fee, with trusts for sale in the mortgagee. The trusts being, at any time after default and upon giving certain notice, to sell, and thereout to pay himself all costs incurred therein, and all arrears of principal and interest, and, in the next place, to pay over the surplus to the mortgagor, or as he shall direct,



there must, of course, be the usual covenants by the mortgagor, and the usual indemnifying clauses to trustees. Where a mortgage has been made in this way, and then a further sum is advanced by the mortgagee, the deed, on this second transaction, after reciting the original security, taking notice that the money is still due, and acknowledging the receipt of the further sum, should contain a covenant and declaration by the mortgagor that the premises shall stand and be a security, as well for the sum last advanced, and interest, as for the former loan and interest, and that the mortgagee shall stand seised of the premises, "In trust, out of the rents and profits of the estate, to raise such sums of money as will pay off, as well the sum last advanced, and interest, as the former sum and interest, and, subject thereto, to the mortgagor in fee."

If, on a first mortgage, a term have been assigned to a trustee for the mortgagee, then, on any further advance, the deed, charging the same, should contain a declaration that the trustee shall stand possessed of the term, "in trust, for better securing to the mortgagee, his executors, &c. the payment, as well of the sum last advanced, as of the sum before lent, with interest on them both, and, subject thereto, In trust for the mortgagor, and to attend the inheritance."

Mortgages with trusts for sale cannot, in strict propriety, be transferred without the concurrence of the mortgagor, because it does not seem that a new set of trusts for sale can be created without him, and though the legal estate would pass, yet the trusts could not be delegated so as to place the transferee in the place of, and vest him with the powers of, the original mortgagee, without the concurrence of the mortgagor; and there-

Declaration in  
a second mort-  
gage, as to an  
attendant term.

Transfer of a  
mortgage,  
with trusts for  
sale &c.

CHAP. V.  
SEC. II.

fore no valid execution of the trusts could be effected, unless by the original trustee. In such a case, therefore, if the mortgagor do not join, it seems to be the proper course to assign the principal and interest to the new mortgagee, and insert a declaration "that the original mortgagee, his heirs, &c., shall stand seised in trust, by sale, (or by the ways and means in the original mortgage mentioned) to raise the principal and interest, and pay the same to the new mortgagee, his executors, &c., and, subject thereto, for the owner in fee." So where the money due on such a security is to be transferred to a legatee, in satisfaction of a legacy given by the mortgagee, a similar course seems to be the most prudent, though it has been laid down by a very eminent conveyancer, that, in such a case, after assigning the principal and interest, new trusts for sale may be created: but *quære*.

Covenant that mortgagor will join in sale under the trust.

In mortgages of this kind, it is not uncommon to insert a covenant by the mortgagor, that he will join in any sale or mortgage under the trust; but such a covenant is quite nugatory, the sale or mortgage being valid with or without his concurrence, with his consent or against it.

Order of the trusts in mortgages with powers of sale.

When a mortgage with trusts for sale is created, there being already prior incumbrances or mortgages, the first trust, after that for paying the costs of sale &c., should be to raise and pay off such prior mortgages or incumbrances.

Successive advances by mortgagee.

If the mortgagee, after his first loan, is to advance further sums from time to time to the mortgagor, the mortgage should always contain trusts for sale; and, in such a case, after the trust to raise and pay the sum first lent, with interest, another trust may be introduced

to raise and levy out of the premises "such further sum  
 "or sums of money, as the mortgagee shall, at any time  
 "or times thereafter, advance and lend to the mortgagor,  
 "or in which he shall become indebted to the mortgagee  
 "on any account whatever, with interest for such further  
 "sums, from the time or times of advancing the same,  
 "or from the time or times at which the mortgagor  
 "shall become indebted to the mortgagee, and, subject  
 "thereto, in trust for the mortgagor in fee." As the  
 covenant for payment of the money cannot be very  
 properly extended to sums to be advanced subsequently,  
 it should be confined to the original loan; but, if thought  
 necessary, bonds may be taken for the further sums  
 advanced.

CHAP. V.  
 SEC. II.

It is not unusual, in mortgages, to direct, in the proviso for redemption, that, on repayment of the mortgage money and interest, the lands shall be conveyed, not to the mortgagor in fee, but to him for life, remainder to his wife for life, remainder to his children, in fee or in tail, or in such other manner as may be agreed upon. In such a case, if the mortgage is to be transferred, all persons having any interest in the equity of redemption ought to join in the transfer, and a proviso must be inserted in the new deed, directing the lands to be reconveyed to the same uses (detailing them) as are mentioned in the original mortgage; for the persons to whom the redemption is thus limited, have vested equitable estates in the lands, which cannot afterwards be divested by the act of the mortgagor and mortgagee, but the concurrence of all parties, who have an interest, must be had, to the creation of any new estates different from the former. If the equity of redemption be entailed, subject to the mortgage, a fine or recovery (as

Necessary parties on a transfer, where there are special limitations in the proviso of the original mortgage.

CHAP. V.  
SEC. III.

Consequence,  
in such a case,  
where all the  
parties cannot  
be come at.

the case may require) must be had to the creation of new estates in the equity of redemption.

If all the parties interested in the equity of redemption cannot, from death, absence, infancy or other causes, be procured to join in the transfer of the mortgage, then no new proviso can, strictly speaking, be inserted ; but the lands must be conveyed to the new mortgagee, subject to such rights and equity of redemption as are then subsisting, and the money must be assigned to him ; but if the equity of redemption has been limited to the father for life, remainder to such uses as he shall appoint, remainder to his children, or such other persons as he may appoint in fee or in tail, the father may appoint, and the old mortgagee may release to the new mortgagee, subject to a proviso, that on payment of the money, the estate shall be conveyed to the father for life, remainder to such uses as he shall appoint, remainder to his children or other persons in fee, or in tail, as in the first mortgage. And this may be done, because the father's power of appointment precedes the limitations to his children, which are divested by his exercise of that power. If no such power has been created by the first mortgage, still, if the father be a party to the transfer, a new proviso may be inserted in it, declaring that the premises shall be reconveyed to the uses declared in the first mortgage deed, (in which cases, these should be fully stated in the recital of it, and it is always so done when the uses are numerous, or to the use of the father for life, remainder to his children or other persons in fee or in tail, as in the first mortgage-deed.) By this mode, the legal estate only changes hands, and the children, &c., take precisely the same interest in the equity of redemption, by the transfer, as they had by the

original deed, and therefore, as to them, it is merely the substitution of a new trustee to uses. But, in such cases, the uses must be exactly the same as are expressed in the original mortgage, or such as by death or otherwise have indisputably taken place since it was executed, otherwise the proviso will be void as to the party whose former estate has not been secured under it to the same extent as under the first mortgage. If the father joins in the transfer, in the way last stated, it is usual for him to covenant, that he, or the person or persons entitled to the equity of redemption, will pay the mortgage-money and interest; but he must not covenant for the title.

When a new proviso is not inserted, (and, perhaps, when it is, in such a case as the one last above supposed) the mortgage-money should be assigned to the mortgagee, that he may not only have an equitable charge or lien on the land, if the legal estate should not be regularly transmitted to him, but also that he may be able to sue the original mortgagor upon his covenant for the payment of the money. And a power of attorney should be given to the transferee, for an action upon such a covenant must be brought in the name of the original covenantee, or his executors or administrators, for money due on covenant is a *chose in action* like a bond, and not assignable at law.

When a new proviso not inserted, mortgage money should be assigned to the mortgagee.

### SECTION III.

#### *Of the mortgage of leaseholds for lives and years.*

Where money is advanced on estates held under renewable leases, the estate should be vested in the

General provisions of a mortgage of leasehold.

CHAP. V.  
SEC. III.

mortgagee, " in trust, out of the rents and profits  
 " of the premises, to pay the rents reserved by  
 " the original lease, and to perform the covenants  
 " therein contained on the lessees' or assignees' part,  
 " and to renew the lease, and, out of the rents, or by  
 " mortgage of the premises, to raise and levy a compe-  
 " tent sum of money for paying the fine, fees and expen-  
 " ses of every such renewal, and, subject thereto, the  
 " mortgagee must be declared to stand seised or possess-  
 " ed (as the case may be) of the premises during the con-  
 " tinuance of the estate term and interest, by the  
 " present, and all subsequent leases, granted, or to be  
 " granted, In trust, by mortgage or sale, to raise and  
 " levy the mortgage-money and interest by a given day,  
 " and, subject thereto, In trust for the mortgagor."  
 On the mortgage of such property, the subsisting lease  
 should be recited, and if it has not been granted to the  
 mortgagor himself, it must be deduced to, and be shewn  
 to be vested in him, and there should be a covenant for  
 payment of the mortgage-money and interest, that the  
 lease is valid and subsisting, and the other usual  
 covenants.

Provisions for  
the renewal of  
the lease.

Where leasehold for lives or years is mortgaged under  
 a common proviso, and the mortgagor is unable or  
 unwilling to renew the lease, it is necessary for the  
 mortgagee to do it, and therefore, in common mortgages  
 of this kind, it is usual to insert an agreement to that  
 effect, and also that any money advanced for that pur-  
 pose by the mortgagee, shall pay interest from the time  
 of advancing it, though it is now clearly settled that,  
 even without such a stipulation, money advanced by the  
 mortgagee for the fines and fees of renewal shall be  
 liable to interest, from the time of its being advanced.

Care should always be taken that the lease be renewed in the name of the person who had the former interest, or in the name of his representatives, for otherwise the new lease will be *voidable*, or perhaps *void*.

CHAP. V.  
SEC. III.  
Precautions as to the renewal of leases.

If the owner renew the lease in his own name, when the lands are in mortgage, a new deed must be prepared, by which, after reciting the lease subsisting at the time of the mortgage, the mortgage-deed, and the new lease, and taking notice that the same was taken in the name of the mortgagor, subject to the payment of the mortgage-money and interest, to and for his own use and benefit, the mortgagor must convey or assign to the mortgagee, In trust to renew, &c., or subject to a proviso for redemption, as the case may be.

Renewal in the name of the mortgagor.

When, on the other hand, a lease for lives or years is renewed in the name of the mortgagee, inasmuch as, without a declaration of trust, he would appear to be the owner of the estate, it is necessary that a deed should be executed, by which, after reciting the old lease, the mortgage, and the new lease, and taking notice that the mortgage-money remains due, the lessee must declare, that the lease was so "made to, and taken in his name, " In trust, in the first place, for securing the mortgage-money and interest, and, subject thereto, In trust for " the mortgagor."

Renewal in the name of the mortgagee.

If a sum of money is to be borrowed for a short period, on the security of leasehold for lives, the lessee, after reciting the lease, may demise " for a term of years, *habendum* to the mortgagee for the term, (if the [*three*] " lives, or if any of them, shall so long live) subject to " the usual proviso for making void the term, with the " usual covenants on a demise, and a covenant from the " mortgagor, that at the death of any of the trustees, he

Form of mortgage, where the term is only for a short period.

CHAP. V.  
SECT. IV.

“ will procure a renewal of the lease, by adding a new life, and will make a fresh demise for securing the mortgage-money and interest.” This mode of mortgage leaves in the mortgagor the power of surrendering and renewing the lease in his own name, without the concurrence of the mortgagee.

## SECTION IV.

### *On the mortgage of West Indian property.*

Proper securities on mortgage of West Indian property.

In lending money on Jamaica security it would be prudent to take a mortgage payable at a short day, and an admission of judgment in ejectment for the land, and judgment in replevin for the slaves and stock, and then give a defeazance not to enforce payment of the principal of the mortgage, or to carry the judgments into execution, (except lodging writs thereon, from time to time, so as to prevent the necessity of reviving by *scire facias*) for such term as shall be agreed on, Provided the mortgagor ships his crops of sugar to the mortgagee, and thereout pays all advances subsequent to the mortgage, which will include the annual supplies sent out to the estate, the interest of the mortgage-debts, and a certain portion of the principal, and the remainder to be paid to the order of the mortgagor.

A list of the slaves and stock should always be annexed, and a separate list taken by the mortgagee, and a certificate or memorandum at the bottom, signed by the mortgagor, expressing that such slaves are upon the estate: the reason of this is, there is a law of the island, empowering mortgagors, or those claiming under them, to give evidence of the identity of slaves and



stock, in case where they are served on by virtue of writs of execution against the mortgagor, and replevied in the name of the mortgagee, and such list will prevent the mortgagor colluding with a judgment creditor, as it secures his testimony to the identity of the thing mortgaged.

CHAP. V.  
SEC. IV.

A mortgage covers the negroes against all junior or subsequent judgments, and the lands against all judgments whatsoever; but the mortgagee is often put to great trouble, and where the mortgage is very old it is almost impossible, to prove the identity of the thing mortgaged, and in case he fails he loses his pledge. For instance, a junior judgment creditor lodges his writ, and levy is made on the slaves actually comprised in the prior mortgage,—the mortgagee brings a replevin against the officer making the levy,—the *onus probandi* lays on the mortgagee, and in case he cannot shew that the slaves levied on were in the possession of the mortgagor at the time of the execution of the mortgage, and included in that pledge, he will be nonsuited, and the slaves will be sold, and the money applied to the prior judgment in the office.

Effect of such  
a mortgage.

The following forms will exhibit the peculiar provisions of a mortgage-deed, and will, at the same time, elucidate the preceding observations.—

PROVIDED ALWAYS, and it is hereby agreed, &c., and their true intention is, that, if the said [*mortgagor*], his heirs, executors, administrators or assigns, shall and do well and truly pay, or cause, &c., to the said [*mortgagee*], his executors, administrators or assigns, the sum of £——, of lawful money current in England, with interest for the same at the rate of £5 for £100, for a year, on or at the following

Proviso and  
covenants in  
a mortgage for  
a term,

CHAP. V.  
SEC. IV.

days or times, (that is to say) half-a-year's interest for the sum of £——, at the rate aforesaid, on the                      day of                      now next ensuing, which will be in the year 18——, and the said principal sum of £——, and another half-year's interest at the rate aforesaid, on the day of                      then next following (being such and the same days or times as are appointed for that purpose in the condition of the bond, of even date herewith) without any deduction or abatement whatsoever, then, and from thenceforth, these presents, and the said term hereby created, shall cease and determine, and be utterly void.

And the said [*mortgagor*] doth hereby for himself, his heirs, executors and administrators, grant, covenant, promise and agree, to and with the said [*mortgagee*], his executors, administrators and assigns, in manner following, (that is to say,) that he, the said [*mortgagor*], his heirs, executors, administrators and assigns, shall and will, well and truly pay, or cause, &c., unto the said [*mortgagee*], his executors, administrators or assigns, the aforesaid sum of £——, and interest, in the parts or shares, and on or at the days or times in the aforesaid proviso and agreement mentioned for payment thereof, without any deduction or abatement whatsoever, according to the true intent of these presents .

Proviso and  
covenant to  
pay in a mort-  
gage in fee.

PROVIDED ALWAYS, and it is hereby agreed, &c., that if the said [*mortgagor*], his heirs, executors, administrators or assigns, shall and do, well and truly, or cause to be paid, to the said [*mortgagee*], his executors, administrators or assigns, the sum of £—— of lawful money, &c., with interest for the same at the rate of £5 for £100, for a year, on or at the following days or times, (that is to say) half-a-year's interest for the said sum of £——, at the rate aforesaid, on the                      day of                      , now next ensuing, and which will be in the year 18——, and the said principal sum of £——, and another half-year's interest, at the rate aforesaid, on the                      day of                      , then next following, (being such and the same days or times as are appointed

for that purpose in the condition of the said bond, of even date herewith without any deduction or abatement whatsoever, then, or at any time thereafter, the said [*mortgagee*], his heirs or assigns, shall and will, upon the request, and at the costs and charges of the said [*mortgagor*], his heirs, executors, administrators or assigns, re-convey to the said [*mortgagor*], his heirs or assigns, the and other hereditaments hereinbefore released, or otherwise dispose thereof, as he or they shall order and direct, free from all intermediate incumbrances to be made, done, committed or suffered by the said [*mortgagee*], his heirs, executors, administrators or assigns :

And the said [*mortgagor*] doth hereby for himself, his heirs, executors and administrators, covenant and agree with the said [*mortgagee*], his executors, administrators and assigns, that he, the said [*mortgagor*], his heirs, executors or administrators, shall and will well and truly pay, or cause, &c., unto the said [*mortgagee*], his executors, administrators or assigns, the aforesaid sum of £——, and interest in the parts or shares, and on or at the days or times in the aforesaid proviso and agreement hereinbefore mentioned for payment thereof, without any abatement or deduction whatsoever, save as aforesaid, according to the true intent of these presents :

PROVIDED ALWAYS, and it is hereby &c., that if the said [*mortgagor*], his executors, administrators or assigns, shall and do, well and truly pay, or cause to be paid, to the said [*mortgagee*], his executors, administrators or assigns, the sum of £——, of lawful money &c., on the day of of , which will be in the year 18——, with interest for the same, at the rate of 5 per cent. per annum, by equal half-yearly payments, on the day of , and the day of , in each and every year, (being such and the same days and times, &c., in the condition of the aforesaid bond of equal date herewith) until payment of the said principal sum, the first half-yearly payment of such interest to be made on the day of

Proviso for redemption at the end of a given number of years,—with provision in case of default, of the regular payment of interest.

CHAP. V.  
SEC. IV.

, which will be in the year 18—, without any deduction or abatement whatsoever, then, and from thenceforth, the said term of            years hereby created, shall cease, determine, and be utterly void, but without prejudice to any other part of these presents, or of the limitations herein contained.

PROVIDED ALSO, and it is hereby &c., that if at any time or times, while the said principal sum of £—, shall remain and continue upon the present security, the interest thereof, or any part thereof, shall be in arrear, and unpaid for the space of [*forty*] days or more, next after the half-yearly days or times hereinbefore appointed for payment thereof, and in any such case, and immediately thereupon, the said principal sum of £—, and interest, shall no longer be payable at the several times hereinbefore for that purpose appointed, but the same principal sum, and the interest then due for the same, shall forthwith become and be payable to, and recoverable by, the said [*mortgagee*], his executors, administrators or assigns, as a personal debt, any thing herein contained to the contrary notwithstanding :

PROVIDED ALSO, and it is hereby further, &c., that if at any time or times, whilst the said principal sum of £—, shall remain and continue upon the present security, the interest thereof, or any part thereof, shall be in arrear and unpaid for [*forty*] days and upwards, next after any of the half-yearly days or times whereon the same shall from time to time become due and payable, and the interest, being so in arrear, the said [*mortgagee*], his executors, administrators or assigns, shall, nevertheless, receive and take such arrears of interest, and if it shall so happen that the interest of the said sum of £—, or any part thereof, shall at any subsequent time or times be in arrear and unpaid for the space of [*forty*] days next after any of the said half-yearly days or times whereon such interest shall from time to time become due and payable thereon, and in such case the said [*mortgagee*], his executors, administrators or assigns, shall not, by reason of his having, at any time or times preceding, accepted or taken such arrears of

interest as aforesaid, be precluded or prevented from demanding, recovering or receiving of and from the said *[mortgagor]*, his heirs, executors, administrators or assigns, the said principal sum of £——, in consequence of any subsequent non-payment of the interest thereof, or any part thereof, for forty days next after any such half-yearly days or times as aforesaid, any thing hereinbefore contained, or any conclusion of law, to the contrary, notwithstanding:

CHAP. V.  
SEC. IV.

PROVIDED ALWAYS, and it is hereby &c., that if the said *[mortgagor]*, his heirs, executors, administrators or assigns, shall and do, on or before the      day of      , which will be in the year 18——, well and truly transfer, or cause to be transferred, the sum of £——, —— per cent —— annuities, to or in the name or names of the said *[mortgagee]*, his executors, administrators or assigns, and also shall and do, in the mean time, well and truly pay or cause to be paid to him or them, such and the same sum or sums as the dividends of the said sum of £——, —— per cent —— annuities, would have amounted to, if the same had not been sold out on or at such and the same days or times as the same dividends would in that case have been payable, (being such and the same days or times as are appointed for that purpose in the condition of the aforesaid bond of equal date herewith) without any deduction or abatement thereout for taxes or otherwise, then, &c.

Proviso for redemption on re-transfer of stock.

PROVIDED ALWAYS, and it is hereby &c., hereto, and, especially, by the said *[mortgagor]*, that, notwithstanding the said recited bond of equal date herewith, executed and given by the said *[mortgagor]*, to the said *[mortgagee]*, for better securing the payment of the said sum of £—— hereby further secured, and the interest thereof, as aforesaid, and also the covenant of him, the said *[mortgagor]*, hereinbefore contained for that purpose, and for the title to and further assurance of the premises hereby      or any other matter or thing herein on his part contained, yet, as between the said *[mortgagor]*, his heirs, executors and ad-

Proviso in a mortgage under a trust-term, with bond and covenant by tenant for life that the land shall be the primary security.

CHAP. V.  
SEC. IV.

ministrators on the one hand, and the and other hereby assigned, and the person or persons (except him, the said ), who shall, for the time being, be entitled thereto, under the limitations of the said indenture of the said day of on the other hand, the same and other shall be the primary security and ultimate fund for payment of the said sum of £—, and the interest thereof, and the aforesaid bond and covenant of the said [*mortgagor*] shall be only collateral and auxiliary securities for payment of the same, and for the further assurance of the and other hereditaments herein comprised by way of mortgage; But this present proviso and declaration is to be without prejudice to the right of the said , his executors, administrators and assigns, to resort to whichever of his or their securities for payment of the said sum of £—, and the interest thereof, or any part or parts thereof, and in whatever manner he or they shall think fit, as fully and absolutely, to all intents and purposes, as if this proviso and declaration were not herein inserted;

Trusts to sell by way of mortgage for securing a specific sum and interest.

UPON TRUST, that in case the said [*mortgagor*], his heirs, executors, administrators or assigns, shall and do, well and truly pay, or cause to be paid, to the said [*mortgagee*], his executors, administrators or assigns, the sum of £—, of lawful money current in England, with interest for the same at the rate of 5 *per cent. per annum*, on or at the following days or times, (that is to say,) half-a-year's interest for the said sum &c., and the said principal sum of £—, and another half-year's interest &c., (being such and the same days or times as are &c.,) without any deduction &c., Then, and in such case, and while such interest as aforesaid shall be duly paid;

Trusts to permit mortgagor to retain possession.

In trust to permit and suffer the said [*mortgagor*], his heirs and assigns, to retain the possession, and receive and take the rents, issues and profits of the and

other hereditaments hereby released or intended &c., until the said principal money of £——, shall become payable as aforesaid, and in case the same principal sum and all interest for the same shall be duly paid and discharged at the times and in manner aforesaid,

CHAP. V.  
SEC. IV.

Upon trust thereupon, or at any time thereafter, at the request, costs and charges of the said [*morgagor*], his heirs or assigns, to re-convey to him or them, or as he or they shall &c., the                      and other hereditaments hereby released or intended so to be as aforesaid, and every part thereof, freed and discharged from all charges and incumbrances to be made, done or committed by the said [*mortgagee*], his heirs or assigns in the mean time ; But in case the said [*mortgagor*], his heirs, executors, administrators or assigns, shall make default for the space of [*two*] calendar months or more in payment of the said sum of £——, or of the interest thereof, or any part thereof respectively, at the times and in manner aforesaid, Then

Upon trust, or to the intent, that the said [*mortgagee*], his heirs and assigns, shall and may enter into the possession or receipt of the rents and profits of the                      and other hereditaments hereby released; and shall and may at any time or times thereafter, at his or their discretion, absolutely sell and dispose of the said                      and other hereditaments, or any part or parts thereof, either by public sale or private contract, or by both of such means, in such lots, parcels and manner, as he or they shall think fit, without the consent or concurrence of the said [*mortgagor*], his heirs, executors, administrators or assigns, unto any person or persons whomsoever, for the best price or prices that can or may be reasonably obtained for the same, and shall, and may, for that purpose, enter into, make and execute all necessary contracts with, and conveyances to the purchaser or purchasers thereof as he, she or they shall direct, with power to resell, in like manner, any of the same hereditaments, which may be contracted to be sold, but which contract shall not afterwards be com-

Trusts in default of payment to permit mortgagee to enter and sell.

Declaration  
that mortga-  
gee's sale  
shall be valid  
and his receipt  
good dis-  
charges.

pleted, and to deal with respect to such first contracts, and the deposits and damages thereon, as he or they shall think fit.(1)

And it is hereby agreed and declared between and by the parties hereto, that all and every the sales, conveyances, and assurances, acts, deeds, matters and things, which shall be made, done, or executed by the said [*mortgagee*], his heirs or assigns, of and concerning the premises hereby authorized to be sold as aforesaid, shall be as valid and effectual in law, though the said [*mortgagor*], his heirs or assigns, shall not execute or assent to the same, as such

(1) Mortgages with powers of sale in the mortgagee, are now so firmly established and found to operate so conveniently in practice, that any remarks on either point would be entirely useless. The following observations however, which according to a M.S. note of *Roberts v. Bozon*, (Ch. Feb. 1825,) given in Mr. Coventry's *Mortgage Precedents*, will shew they were admitted, with some reluctance, by Lord Eldon.—“Here the mortgagee is himself made the trustee, it would have been prudent for him not to have taken upon himself that character. But it is too much to say that if the one party has so much confidence in the other as to accede to such an arrangement, this court is for that reason to impeach the transaction. It is next provided (continued his Lordship,) that if the mortgagor shall make default in paying the sums stated at the appointed time, the mortgagee may make sale, and absolutely dispose of the premises conveyed to him. This is an extremely strong clause, but perhaps it is one of the many new improvements in conveyancing, which make conveyancing so different from what it was when I had any practice in that part of law.” [Here his Lordship enquired of Mr. Sugden how the practice was in that respect, Mr. Sugden admitted that the clause was usually inserted in deeds like the present.] Lord Chancellor:—“How can it be right that such a clause should be introduced into a deed under which the party is a trustee for himself? Then there is a clause, that it shall not be necessary for the purchaser to enquire whether the sale was proper, &c. Here too it must be recollected, that is a clause to be acted upon not by a middle person, who is to do his duty between the *cestuis que trust*, but the mortgagee is himself made trustee to do all those acts. Upon the whole, I must say, that this deed seems to me of a very extraordinary kind, and that there are clauses in it upon which it would be very difficult to induce a Court of Equity to act.”



conveyances or assurances, acts, &c., would have been if the said [*mortgagor*], his heirs or assigns, had duly executed or assented to the same, and that the receipt or receipts in writing of the said [*mortgagee*], his heirs or assigns, shall be a sufficient and effectual discharge, or sufficient and effectual discharges, to any purchaser or purchasers of all or any part of the same hereditaments and premises, for his, her or their purchase-money or monies, or so much thereof as shall be thereby acknowledged to be received, and that the same purchaser or purchasers, his, her or their heirs, executors, administrators or assigns, shall not afterwards be answerable or accountable for the loss, misapplication or non-application, or be in any wise obliged, or concerned, to see to the application of, or to the necessity for raising the money in such receipt or receipts acknowledged to be raised, or any part thereof, nor to the fact of the said mortgage-debt and interest, or any part thereof, being unpaid for [*two*] calendar months, or more, after the aforesaid times of payment thereof;

CHAP. V.  
SEC. IV.

Purchaser to see to the application of the purchase money.

And it is hereby agreed and declared, that the said [*mortgagee*], his heirs, executors, administrators and assigns, shall stand and be possessed of and interested in the monies to arise from the sale or sales to be made, of all or any of the and other hereditaments hereby authorized to be sold as aforesaid, and the rents and profits thereof, after having entered into the possession or receipt of such rents and profits, until the said premises shall be sold, upon and for the trusts, intents and purposes following, (that is to say),

Declaration of the trusts of the produce of the sale.

IN TRUST, in the first place, to pay and satisfy, and retain to himself, or themselves, thereout, all costs and expenses attending such sale or sales, or otherwise, to be incurred in the execution of the trusts hereby declared; And, in the second place, to retain or pay, and satisfy thereout, to him the said [*mortgagee*], his executors, administrators or assigns, the said sum of £—, and interest, and arrears of interest thereof, or so much, or such parts of the said principal and interest-monies, or any of them, as shall

First to pay costs.

Second to pay mortgage.

CHAP. V.  
SEC. IV.

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Third to pay  
residue.

be then due and unpaid, together with all costs and expenses (if any) attending any non-payment thereof respectively, and after all the aforesaid principal and interest monies, costs and expenses, shall be wholly paid and satisfied, Then in trust to pay over the residue or surplus of the said trust-monies, to arise by the means aforesaid, unto the said [*mortgagor*], his executors, administrators or assigns, for his and their own benefit.

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## CHAPTER VI.

### OF LEASES.

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Persons seised of an estate in fee-simple, or of an estate *per autre vie* (as lessees for lives under bishops, &c.) being of full age and sound understanding, may grant leases for any term less than the interest they have in their respective lands ; and the lease may commence from a day that is past, or from a day to come, differing, in this respect, from a freehold, for though a term of years may be created to commence at a future day, a freehold cannot. Who can grant a lease.

The parties must be described in the same manner as in other legal instruments (that is) by their christian and surnames, rank, profession or business, and place of residence. The parties.

A lease, as well as any other deed, must have a good and sufficient consideration expressed or implied, otherwise it will be invalid, and will enure only to the use of the lessor. A rent reserved is a sufficient consideration ; but it is proper to express that the lease is granted as well in consideration of the covenants as of the rents, because, in some cases, what is covenanted to be done by the lessee, is of greater value than the rent ;—for instance, covenants to repair or rebuild houses, to enclose and cultivate lands, and to drain them, &c. Of the consideration.

The operative words in a lease are “ demise and to farm let.” Operative words.

CHAP. VI.  
SEC. I.

Parcels.

Where there is contiguous or intermixed property of the lessee, the parcels should be carefully described in the following, or some such terms (that is to say), “ All that messuage or dwelling house, situate in the township of *S*, in the said county, with the barns, byers, stables and other out-houses, and the orchard and garden to the same belonging, and now in the occupation of *A. B*, as tenant or farmer thereof, to or under the said [*lessor*], and all those several closes or parcels of ground, situate in the township of *S*, aforesaid, to the said messuage or dwelling-house belonging, or therewith occupied, commonly called or known by the several names, and containing, by estimation, the respective quantities hereinafter mentioned (that is to say),—Eastfield, containing, &c. All which said closes or parcels of land are now also in the occupation of the said *A. B*, Together with all ways, rights and appurtenances whatsoever to the said demised premises belonging.” Where a detached farm is to be leased, it may be sufficient to describe it thus :—“ All that messuage or dwelling-house and farm, and the closes or parcels of ground to the same belonging, or therewith occupied, situate in the township of *S*, in the said county, containing, by estimation,                      acres, &c., and now in the occupation of the said                      , together with all buildings, ways, rights and appurtenances to the same premises belonging.” The words “ be the same more or less,” should always be added to the specification of the quantity, for a lessee would be entitled to recover damages if he paid rent at so much per acre, and it should turn out, at any subsequent period, that the number was overstated.

If any plantations, grounds or ways, are to be reserved to the lessor, they should be excepted immediately after the general words "together with, &c." at the end of the parcels; but care must be taken that any particular field or building, intended to be wholly excepted, be not expressly granted; for if any thing wholly granted be afterwards wholly excepted, the exception is void.—As, if a man grant his house and shop (excepting the shop), the exception is void, the shop having been expressly granted; but if a man grant his house (excepting the shop), the exception is good, for the shop, in that case, passed as part of the house, and an exception out of the generality of the grant is good. The rights of hunting and shooting are sometimes reserved immediately after the parcels, but it seems more proper to secure them by a covenant from the lessee, that the lessor shall be permitted to enter upon the premises for these purposes. If there were no exception or covenant to this effect, the lessee might bring an action against his landlord, if he entered in order to sport; but a jury would give nominal damages only, in case no injury was done to the crops; such nominal damages, however, would carry costs. A right of way may also be reserved to the lessor, by the tenant's covenant, in the latter part of the lease, which seems to be the better way; but if the lessor wishes to reserve to himself the soil and property of the way, that he may repair it himself, the land, and not the right of way only, should be excepted out of the demise. In such a case, the exception may be in these words,—“except, and always reserved out of these presents, and the demise hereby made, so much and such part of the said close and field, called \_\_\_\_\_, as is now used as a road from

CHAP. VI.  
SEC. I.

Exception of  
plantations, &c.

Right of hunt-  
ing,

Right of way.

CHAP. VI.  
SEC. I.

“ to , and the soil and ground of  
“ the said road, with full and free liberty, from time to  
“ time, and at all times, to do every necessary act for  
“ repairing and preserving the said road in good order  
“ and repair.”

If a road have not been already formed, then except the part through which the road is intended to lead, in some such words as these,—“ except and always reserved out of these presents, &c. all that piece of ground, situate at or near the middle of the field, called , which is now marked out and distinguished from the residue by stakes, which said excepted ground extends the whole length of the said field, from east to west, and contains, in breadth, twenty feet at the east end thereof for the length of two hundred feet, and twenty-five feet in breadth for the residue thereof,”—adapting the description, of course, in every instance, to the circumstances of the case. It will be proper to make holes where the stakes are placed, when the ground for the road is set out, and to cause the workmen and agents to pay particular attention to these boundaries, in order, if they should be destroyed or effaced by the tenant, that there may be evidence to ascertain the excepted quantity. If no boundary stakes or stones be placed, the exception may be in these terms,—“ except and always reserved, &c. twenty feet at the middle part, or as near the middle part as may be, of the said close called , for the whole length thereof, from east to west, for the purpose of forming a carriage road, to lead from the mansion-house of the lessor, with such right of passage to and for the said , as well on foot and on horseback, as with carts, carriages and horses, in, to, through, over and along every part of the same

“field, as shall be necessary or convenient for making  
“and perfecting the said road.”

CHAP. VI.  
SEC. I.

The *reddendum*, in all cases where the lessor has an estate in fee-simple, must be to him, “his heirs and assigns,” because the rent is incident to, and passes with the reversion, which, if not aliened in his lifetime, must pass to his heir or devisee. If the lessor have an estate *per autre vie*, the rent may be reserved to him, “his heirs and assigns,” such an estate being devisable and descendible, like a fee-simple; but where the lessor has only an estate for years, the reservation must be to him, his executors, administrators and assigns, because he himself has only a chattel interest in the thing demised, and nothing that the heir can have any concern with. Where, however, there is any doubt as to whom the reversion belongs, the best way is to let the reservation be general, as the law, in such a case, will provide for the rent being paid to the proper person.

The reddendum.

The *habendum* should be to the lessee, “his executors and administrators” only, and not to his “assigns,” in order to prevent any doubt arising, whether it was intended that he should have a power of assigning the lease.

The habendum.

The *habendum* should have a different commencement as to different portions of the land (that is),—as to the arable land on the [*first*] day of [*February*], that the entering tenant may plough the tillage land as soon as the season permits,—as to the ground that has been depastured with cattle the preceding summer, on the [*fifth*] day of [*April*],—and as to the ground which has been in hay the preceding summer, and also as to the houses and buildings, and the rest of the demised premises, on the [*twelfth*] day of [*May*].

Commencement of the term at different times as to the different parts of the farm.

CHAP. VI.  
SEC. I.

In some leases, the term, in the whole, is made to commence, and, consequently, must expire, on the [*twelfth*] of May, and the lessee covenants that he will permit the succeeding tenant to enter upon the different quantities of the land at the above-mentioned periods respectively; but it seems better to have a separate commencement of the term for each species of land, because an ejectment may, in that case, be brought for not giving up the arable land on the day specified for that purpose.

In counties, where the assizes are held twice a year, it would be proper to make the commencement of the lease, as to the arable land, on the first, or, at all events, about the middle of January, and then (Hilary term being an issuable one) a declaration in ejectment may be served upon the tenant, which must be done before the essoign day of the term, (the 20th January); and, if he should resist, a verdict may be obtained against him at the next assizes, which could not be done if there were only one commencement.

It is not usual to insert powers of distress, save where lands and tithes are demised in the same lease, under separate rents, in which case it is proper to give a power of distress upon the land for the tithe-rent, as it cannot, from the nature of the property, be distrained for upon the subject in respect of which the rent is reserved; but if one rent be reserved for both land and tithes, then, as it issues out of the whole and every part of the thing demised, it may be distrained for upon the land.

Days for payment of rent.

All the rents are usually reserved half-yearly, from the commencement of the lease, or the usual time of a tenant's entering; in some cases, at Michaelmas



and Lady-day, in others at Martinmas and May-day; but it would be a beneficial regulation for the landlord to make the first half-yearly rent payable on the first of July, and the second, on the first of September, in which case, the crops being on the premises, might be distrained for a whole year's rent, whereas, if the first half year's rent be payable at Michaelmas or Martinmas, and the second, at Lady-day or May-day, a knavish tenant might defeat his landlord of the second half-year's rent, by selling off his stock and crop within the latter period. In the North-riding of the county of York, and in the counties of Durham and Northumberland, where the tenant has an away-going crop, and, perhaps, of spring corn also, there is little danger of loss, if he happen to have sown his wheat-crop before he runs away, and if he have not, the in-coming tenant will have the land in fallow, and perhaps the spring land also, which are of some value, and, consequently, in some measure an indemnity to the landlord.

The rent may be reserved half-yearly, monthly, or weekly, or even at unequal periods and in uneven sums.

It is usual to reserve an additional rent of £5 per acre (but it ought to be much more if the land be valuable) for any grass land ploughed out by the tenant without the landlord's consent, and it was determined, many years ago, in the case of *Ralph v. Paterson*, in the House of Lords, that the sums so reserved are rents, not penalties, and may be recovered by distress, along with the reserved rent, and the tenant can have no relief, but it is nevertheless proper to give an express power of distress.

Rents reserved as penalties for not scouring hedges, laying lands down to grass &c., are better omitted, as

Reservation of additional rent for &c., when proper.

When such reservation is improper.

CHAP. VI.  
SEC. I.

they are in general disproportionate to the damage, and if any attempt be made to recover them by action, the tenant may file a bill in equity for relief, so that there may be an action at law, and a suit in chancery depending at the same time, where the former only would be necessary, in case damages for these matters were secured by the tenant's covenants.

Proviso for re-  
entry.

If the tenant do not pay his rent at the appointed day, it is, at law, a forfeiture of his lease, and the landlord may bring an ejectment to turn him out of possession; but a court of equity will interpose, on the tenant paying the rent and all costs, and revive the lease, as it would be contrary to all justice, that the landlord should be permitted to take advantage of a slip in payment of the rent. But it is otherwise, if the tenant *assign* his interest, or *underlease* it; for it may be a great injury to the landlord to have a person introduced upon his estate, to whom he is a total stranger, who may be a bad manager and in insolvent circumstances. If, therefore, the lessee assign, or underlet, without consent, the landlord may bring an ejectment, and will recover, equity refusing to interfere in this case. The landlord, however, has, in most cases his option, either to enforce the forfeiture or waive it, as the lease, in general, does not express that a forfeiture shall at all events accrue, but only that it shall be lawful for the landlord to re-enter.

Covenants.

The covenants should, in all cases, be from the tenant with the person to whom the rent is reserved, (that is) with the lessor, his heirs and assigns, when he has the fee simple or the freehold, and with him, his executors, administrators and assigns, when he has only a term or a chattel interest. If a surety be joined with the lessee,

for better securing the rent, the covenant should be from him and the surety, in the following words:—

“and the said [*lessee*] and [*surety*] for themselves, jointly and severally, and for their several and respective heirs, executors and administrators do covenant &c, that the said [*lessee*], his executors &c., shall and will &c”

The first covenant is for payment of rent and taxes; —the second, for repairing the houses, buildings and fences, in which covenant such lasting repairs as are usually done by the landlord, (that is) walls, timbers and roofs, and also damage by fire and tempest, are usually excepted. If a tenant covenant to repair generally, he would, in case the house and buildings were burnt down by fire, or destroyed by tempest, be liable to rebuild them. He should always covenant to lead the materials for such improvements as the landlord is to make.

The tenant should covenant to manage the land in a due course of husbandry, according to the scheme indorsed, if there be one; and, if there be none, according to the custom of the country, for if the tenant change the known and established rotation of crops, and the mode of cultivating land of the same quality in the neighbourhood, to the prejudice of the estate, he may be sued on a breach of the custom, though there be neither lease or grant subsisting.

The next usual covenant is, that the tenant shall not cut or destroy any wood growing upon the premises, except thorns &c., and those at the proper seasons; but, as a bad tenant may cut down the best hedges in a farm where shelter is requisite, the lease should express that the thorns to be cut, for repairing the hedges, &c., shall be assigned or set out by the lessor or his agents. The

Preservation of  
timber.

CHAP. VI.  
SEC. I.

covenant for scouring the fences should require the tenant to repair them, in such places as the landlord, or his agent shall direct, and, in default thereof, where they most need it.

Liberty for the  
landlord to enter  
and inspect  
&c.

The tenant should covenant to permit the landlord to enter upon the premises to inspect the condition and management thereof; and the liberties of hunting and fishing may also be secured by covenant, as well as any occasional rights of way &c.

Liberty to  
plough.

It being of consequence to the in-coming tenant, to plough the fallow land, or the land to be sown with spring corn, in order that he may have that privilege as early as possible, the tenant should covenant to permit the in-coming tenant to enter, for that purpose, any time in the month of January or February last before the expiration of his lease, as the winter eatage can, after that time, be of no further use.

Entering on  
grass land.

So as it is important for the in-coming tenant to have possession, early in the year, of as much grass land as he can get, in order to sustain his stock, the lease should therefore stipulate, that two-thirds, or some other definite portion of it, shall be quitted by the retiring tenant on a given day.

Power to sow  
seeds.

It is a useful power to the landlord, particularly if he be desirous of reducing the quantity of tillage in the farm, to have the liberty of sowing grass seeds upon the way-going crop of the retiring tenant, or, where the custom of the country does not give that crop, upon the wheat and barley which shall be sown in the year preceding the expiration of the lease.

Against over-  
stocking the  
grass land.

It is very necessary to restrain the tenant from overstocking the grass land in the winter and spring preceding the end of the lease.

Every lease should contain a covenant from the lessor that the lessee shall enjoy peaceably during the term, without interruption from any person whatsoever, as where a lease contains such a covenant, and the lessee happens to be turned out of possession by a person having a better title to the estate than the lessor, the latter is still liable to make a satisfaction to the lessee for damage sustained by the loss of his term. In some leases this covenant only extends to the lessor himself, and those who claim under him ; but it should be against all the world, and should always be made conditional, (namely) “ that the lessee, paying the rents and performing the covenants, shall peaceably enjoy,” so that, if he should not pay the rent or perform the covenants, and should be turned out of possession, he would have no claim to damages.

CHAP. VI.  
SEC. I.

Covenant for  
quiet enjoy-  
ment.

Where it is the custom of the country for the tenant to have any away-going crop, he will be entitled to it, though not provided for : it should be made conditional, in the same manner as the covenant for peaceable enjoyment. The lease should also specify, if this can be done, from what particular lands it is to arise.

Away-going  
crop.

Stipulations with regard to the ploughing out and laying down of lands to grass, and any thing which may not be thought of sufficient consequence to be made the subject of a distinct covenant, and all matters, which are of a mutual nature between the landlord and the tenant, may be introduced after the covenants.

Mutual agree-  
ments.

A scheme of husbandry is useful to specify the rotation of the crops, and should always, when practicable, be endorsed on the lease.

Scheme of  
husbandry.



## CHAPTER VII.

### OF PURCHASE-DEEDS.

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1. *Of the conveyance on the sale of an estate free from incumbrances.*
  2. *Of the conveyance on the purchase of an estate subject to a mortgage.*
  3. *Of the conveyance on the sale of lands, subject to rent-charges, annuities, &c.*
  4. *Of the conveyance of leasehold for lives on a sale.*
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#### SECTION I.

##### *Of the conveyance on the sale of an estate free from incumbrances.*

State of the  
title.

Before the contract for purchase be completed, the purchaser should always be satisfied that the vendor can make a clear title for at least sixty-years, though, even with this precaution, cases might arise in which the title would be defective. They are not however, of very frequent occurrence, and therefore, if no defect appear during a period of this extent, the fair legal presumption is, that the title is good.

All parties who grant or receive any interest under the contract, should be made parties to the purchase-deed, and also all parties who are to be bound by its provisions. Thus, on a conveyance to trustees, in trust to sell for the payment of the debts of a person who is living, to disincumber a settled estate, &c., and, particularly, where the residue is declared to be in trust for the vendor, on a conveyance to the purchaser, the parties should be,—the owner of the estate, of the first part,—the trustees for sale, of the second,—and the purchaser, of the third.

CHAP. VII.  
SEC. I.

Parties to purchase-deeds.

Where there has been a contract between *celles que trust*, the intermediate *cestui que trust*, who has parted with his interest, need not join ; for it is quite clear, that an intermediate trust, or equitable estate or interest, is, in real operation, nothing,—the ultimate equitable claimant is the real *cestui que trust*, and to him only need the trustee, for the original *cestui que trust*, convey.

Where the vendor is married, the wife must be a party, and there must be a covenant to levy a fine, unless the sale be of lands purchased by the vendor, and conveyed to him, subject to uses to prevent dower. Where the estate is a remainder or a reversion, as the wife is not dowable out of such an estate, of course she ought not to be a party. In the conveyance of it, however, to a purchaser, it is generally proper to limit it to uses to prevent dower, for otherwise, when it comes into possession, a right to dower will attach.

When a conveyance is made to or by joint-tenants or co-parceners, it is correct to make them all of one part,—but where by tenants in common, they should be of several parts.

CHAP. VII.  
SEC. I.

Recitals.

Where the vendor is seised of an estate in fee-simple, and free from any charges or incumbrances, the recitals will be very simple: it would, in such case, be merely necessary to state that the vendor is so seised,—that he has agreed to sell the property to the purchaser for a certain sum,—and that the latter is desirous of having the estate conveyed to him by a good and valid assurance. It is not unusual in such instances (especially in old deeds), instead of distinctly reciting the contract, to introduce it into the witnessing part, in this form,—“ Now this Indenture witnesseth, that in consideration  
“ of the said sum of £—— (being in full for the abso-  
“ lute purchase of the messuage, &c., hereinafter describ-  
“ ed, and intended to be hereby granted and conveyed)  
“ &c.” Such a mode of introducing the contract, is awkward and improper; except, perhaps, where part of the purchase-money is paid to a mortgagee, and then such an averment in the witnessing part, even if there have been a previous recital of the fact, seems not to be incorrect, but rather to contribute to the clearness of the draft. In such a case, the contract may be introduced in these terms,—“ In consideration of the sum of £——,  
“ being in full satisfaction and discharge of the princi-  
“ pal money and interest due and owing to the said  
“ [*mortgagee*], on his said mortgage and security made  
“ to him as aforesaid, and also in consideration of the  
“ said sum of £     , other part of the said sum of £——,  
“ agreed to be given, &c., the aggregate of the said two  
“ sums of £——, and £——, being in full for the abso-  
“ lute purchase of the said messuages or tenements, lands  
“ and hereditaments, and the fee-simple and inheritance  
“ thereof.”

Where husband and wife join in a conveyance on



sale, or, indeed, for any other purpose, and the estate belongs to the husband, this fact should be recited; for, in the absence of such a recital, the presumption would be that the estate belonged to the wife. If a woman, either alone, before a second marriage, or afterwards, concurrently with her second husband, convey an estate, of which she is tenant in tail, her title should be recited, in order that it may appear that she is not seised *ex provisione viri*, for she has no power to alien such an estate.

CHAP. VII.  
SEC. I.

The recital of the contract or agreement and object of the deed, when the parties contemplate any thing beyond a mere sale at a full value, should be clearly recited. In the case here supposed, when the vendor is seised in fee, and free from incumbrance, the recital may be thus:—"WHEREAS the said [*purchaser*] hath contracted with the said [*vendor*] for the absolute purchase of the messuages, or tenements and hereditaments, hereinafter described, and intended to be hereby granted and released, with the appurtenances, and the inheritance thereof in fee simple in possession, free from incumbrances, at or for the price or sum of £—. AND WHEREAS the said [*purchaser*] is desirous that the same messuages or tenements, hereditaments and premises, should be conveyed as hereinafter is mentioned."

Where the tenant by curtesy, either of the legal or equitable estate, joins the remainder man in fee, or the reversioner in a sale, the agreements, as to the division of the purchase-money, should be expressed in the deed immediately after the recital of the contract, and may be done in some such terms as these:—"AND WHEREAS it hath been agreed between the said [*tenant by cur-*

CHAP. VII.  
SEC. I.

“ *tesy* ] and the said [ *reversioner* ] that the sum of £——, part of the said purchase-money, shall be paid to the said [ *tenant by curtesy* ] as a compensation and satisfaction to him for his estate for life, as tenant by the curtesy of and in the said premisses. Now THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the said sum of £——, part of the said purchase-money, to the said [ *tenant, &c.* ] in hand, &c., as and for the purchase of his estate for life of and in the said premises (the receipt, &c.), And in consideration of the sum of £——, the residue of the said purchase-money, &c. they, the said [ *tenant, &c.* ] and [ *reversioner* ] HAVE, and each of them HATH granted, &c. ;” for the tenant by the curtesy having an estate for life, the freehold will move from him, and the deed will, in law, be considered as the grant of him and the confirmation of the reversioner.

Contract for  
purchase.

Where lands of different tenures, or held under different titles, are contracted to be sold at one price, and are to be conveyed in separate parcels, it is often convenient, with a view to the provisions of the stamp acts, to apportion the consideration-money. Suppose, for instance, that an estate, consisting partly of freehold and partly of copyhold, were sold for an entire sum, it would be proper to introduce the operative part of the deed by such recitals as these :—“ AND WHEREAS, “ the said [ *purchaser* ] hath contracted and agreed with “ the said [ *vendor* ] for the absolute purchase of the “ said freehold and copyhold messuages, or tenements, “ lands, hereditaments and premises hereinafter particularly described, and intended to be hereby respectively released and covenanted to be surrendered, with

“ their respective appurtenances, and the inheritance  
 “ thereof respectively, free from incumbrances, at or  
 “ for the price or sum of £——, And it hath been  
 “ agreed, that the sum of £—— (part of the said sum  
 “ of £——,) shall be considered the purchase-money  
 “ for the said hereditaments and premises hereinafter  
 “ firstly described, with the appurtenances, And that  
 “ the sum of £—— (the residue of the said sum of  
 “ £——) shall be considered the purchase-money for  
 “ the said hereditaments and premises hereinafter  
 “ secondly described, with the appurtenances,”

CNAF. VII.  
 SEC. I.

Agreement as  
 to the apportion-  
 ment of the pur-  
 chase-money.

“ AND WHEREAS, the said [*purchaser*] is desirous  
 “ that the hereditaments and premises hereinafter de-  
 “ scribed, with their respective appurtenances, should  
 “ be conveyed or covenanted to be surrendered to the  
 “ uses and in the manner hereinafter mentioned.”

Desire of pur-  
 chaser to have  
 the premises  
 conveyed.

The consideration should be fully stated in the  
 operative part of the deed, (unless it be complex, for  
 then it may be more conveniently introduced among the  
 recitals). Care must be taken that the consideration  
 moves from the proper parties, and all persons entitled to  
 receive any portion of it must join in acknowledging the  
 receipt thereof.

The considera-  
 tion.

Trustees may convey by the word “grant,” for though  
 the word “grant” be used by a trustee, it does not imply  
 a warranty, more especially when there is an express  
 covenant from the trustee, that he has done no act to in-  
 cumber. On a conveyance by feoffment, the word  
 “grant” *must* be used ; every feoffment being a grant  
 of land to which livery of seisin gives effect. In such  
 deeds, therefore, the words “give and grant,” are indis-  
 pensably necessary, and the words “granted and con-  
 firmed” (omitting the word ‘enfeoffed’) are proper to be

Operative  
 words on a  
 conveyance by  
 trustees.

CHAP. VII.  
SEC. I.

used in referring to the parcels after the conveying part of the deed, for it is not the writing, but the subsequent ceremony of livery of seisin that makes the feoffment, and as the writing precedes that ceremony, the word "enfeoffed" cannot be supposed to have any reference or effect, although it is always put among the operative words. The word "grant" is also essential on all occasions where incorporeal hereditaments, as tithes, rents, reversions, &c., are conveyed by a deed without a lease for a year.

The Parcels.

The parcels should be minutely described by their denominations and quantities, boundaries, and the names of the occupier. It is better, whenever it can be done, to adhere to the old description ; but if it should be necessary, in consequence of the changes which may have taken place in the denominations, division or boundary of the parcels, to introduce a modern description, the latter should be connected with the former by some such words as these,—“all which said parcels and premises were formerly called or known by the name of &c.” So where the property to be conveyed is held by the vendor, under different titles,—as part by descent, part under a purchase, and part under a will,—it will be proper, in the recital of these several instruments, to class the parcels comprised under them severally, as the “messuages, hereditaments &c., firstly, secondly, &c., hereinafter described ;” and when the parcels are afterwards introduced in the witnessing part, to connect them with the former mention of them, in these words :—“All which messuages, hereditaments &c., are the messuages, hereditaments, &c., hereinbefore mentioned, as intended to be firstly herein described,”—or “all which

“messuages and hereditaments &c., are the messuages  
 “&c., mentioned in the hereinbefore recited will of  
 “the                      day of                      in the year  
 “and mentioned or intended to be secondly herein  
 “described.”

CHAP. VII.  
 SECT. I.

Where the parcels are various, or, from some peculiar circumstances, involved in a good deal of complicated description, or where they are held under distinct titles, or are situated in distinct lots, the description of them will be most conveniently introduced in the recitals, or by way of schedule; in the latter case, it will be proper to refer to them as the “messuages or tenements, lands, hereditaments and premises, with the appurtenances mentioned and described in the first schedule hereunder written or hereunto annexed, &c.”

In a conveyance by trustees under a will, the parcels should be followed, by what is called the <sup>Sweeping clause.</sup>  
 ‘sweeping clause,’ which may be introduced thus:—  
 “All that messuage &c., and all and singular other  
 “the hereditaments and real estate, if any, which were  
 “so given and devised by the said recited will of the  
 “said [*testator*] as hereinbefore is mentioned, and also  
 “[*general words*].”

In the conveyance of a life-estate, the clause of “all the  
 “estate,” or in a mortgage for a term, the clause of “all  
 “the reversion” is improper. General words should always  
 be omitted in covenants to surrender copyholds, and it is the practice of many eminent conveyancers to omit also the clauses, “and the reversion, &c.” and “all the estate, &c.” In purchase deeds, the clause “and all deeds, &c.” seems, by the almost universal concurrence of conveyancers, to be unnecessary, though by

The clauses  
 containing the  
 general words  
 &c.

CHAP. VII.  
SEC. I.

some very eminent and learned lawyers, it is still retained (1).

In a purchase-deed, general words carry tithes.

If the estate, to be sold, be subject to the payment of tithes, but the tithes belong to the vendor, they will pass by general words in the conveyance; though in a fine or recovery they do not pass without being mentioned. If the vendor, therefore, wish to reserve the tithes, they must be excepted by express words: so if he wish to secure to himself any easements, rights of way, or other rights or privileges, the estate must be conveyed subject to them.

Covenant to levy a fine.

If the estate be subject to the dower of the vendor's wife, the release must contain a covenant to levy a fine, and it should be expressed, "that for the further and better conveying, &c., and for barring and extinguishing the right and title of dower of the wife, and all other rights and interests whatsoever of, in, to or out of the premises," the husband covenants "that he and his wife, she hereby consenting," &c. It is a common error to make the husband covenant "for himself, his heirs, &c., and also for his wife," which is clearly wrong, as the husband cannot bind the wife by covenant. It is usual and proper to make her a party to the release, for though she can convey no interest by joining in the conveyance, yet she thereby manifests her consent to the husband's covenanting to levy a fine for the purpose of passing her estate. This covenant ex-

(1) See 1 Saund. Us. and Tr. 119, for the reasons which have induced the learned author to adopt this clause. Mr. Preston also uses it. See 2 Prest. Conv. 466, for his reasons. See also Noy, 145, and Co. Litt. 6 a. n. 141, where Mr. Hargrave argues against the use of it. It has been contended that this clause is necessary in a mortgage for a term (*Wiseman v. Westland*) 1 Yo. and Jerv. 117; and see 3 Barn. and Cress. 225.

presses, that “for the further and better conveying, &c.,  
“and for barring and extinguishing the dower, and right  
“and title of dower, of the wife, and all other estates,  
“rights and interests whatsoever of, in, to or out of the  
“premises, the husband covenants, &c. to levy a fine;”  
“—because in this way the fine bars every person having  
any interest in the lands; whereas if it were expressed  
to be levied only for the purpose of barring the wife’s  
estate, it would not have any more extensive operation.

Where the purchaser wishes, as is now generally the case, to prevent the wife’s claim to dower, there must be the usual limitations to bar dower. Although the principle and form of this clause are now well understood, and clearly settled, yet the following observations on them, from a very eminent writer on this subject, may still be useful:—

“As the limitations suggested by Mr. Fearne for barring dower are often framed, “the lands are conveyed to  
“such uses as the purchaser shall by deed sealed and delivered by him, in the presence of, and attested by two or  
“more witnesses, or by will signed and published by him,  
“in the presence of, and attested by three or more witnesses, direct or appoint,” and in the particular form used by Mr. Fearne, the ultimate limitation is expressed to be to the party himself, his heirs and assigns.

Mr. Butler’s observations on the proper form of these limitations.

“Now, it is apprehended that no good reason can be assigned for requiring any specified number of witnesses to the execution of the deed by which the power is executed,—it seems, therefore, sufficient to require that the deed shall be legally executed. Nor can a good reason be assigned for giving the party a power to appoint by will, as he has the absolute ownership of the fee, and may as fully and effectually dispose of the fee-

simple, by virtue of that ownership, as through the medium of a special power,—the power of disposing by will is, therefore, useless; but it is attended with this inconvenience, that it sometimes gives rise to nice questions, whether the disposition operates as a devise of the land, or as an appointment of the use, and thus makes it doubtful in whom the legal estate is vested. For this reason, it seems advisable to omit wholly out of the clause the power of appointing by will.

In respect to the ultimate limitation, as a life-estate is first limited to the party, it seems more accurate to limit the fee to his heirs and assigns, and not to the party himself, his heirs and assigns; but this is merely verbal criticism, as both limitations have exactly the same legal operation and effect.

If these observations are received, the clause may stand as follows: “To such uses, upon and for  
“such trusts, intents and purposes, and with, under  
“and subject to such powers, provisoes, charges, declarations and agreements, as the said *A. B* shall, by  
“any deed or deeds, with or without a power of revocation or new appointment, to be by him legally executed, direct or appoint; and in default of, and until  
“such direction or appointment, and so far as the same  
“shall not extend, TO THE USE of the said *A. B* and his  
“assigns during his life, and after the determination  
“of that estate, by any means, in the lifetime of the  
“said *A. B*, TO THE USE of the said *C. D* and his  
“heirs, during the life of the said *A. B*, IN TRUST for  
“him and his assigns; and after the expiration or  
“sooner determination of the said uses or estates, TO  
“THE USE of the heirs and assigns of the said *A. B*  
“for ever.”



“ It sometimes occurs in practice, that *A. B* being tenant for life, remainder to trustees and their heirs, during his life, IN TRUST for him, with the immediate reversion or remainder in fee to himself, conveys to *C. D* in fee, without the concurrence of the trustees. Now, during the life of *A. B*, the wife of *C. D* will not be dowable, as the inheritance, during the life of *A. B*, will not be executed in *C. D* in possession, on account of the limitation to the trustees during the life of *A. B*, for *C. D* will be only tenant for the life of *A. B*, remainder to the trustees and their heirs, during the life of *A. B*, IN TRUST for *C. D* and his heirs, during the life of *A. B*, remainder to *C. D* in fee-simple.”

Where there are outstanding terms, they must either be merged or assigned to attend. As a general rule, it is proper to preserve the oldest on foot and to merge the rest. Circumstances, however, as, for instance, some difficulty in deducing the title to the oldest, may render it expedient to preserve one of more modern date. So it may happen to be necessary to preserve several of the terms, as, for example, where they relate to separate portions of the estate, or there is any uncertainty whether such and such terms comprise the whole estate. If there be a term which it is intended to merge, it may either be surrendered at the end of the deed, or the termor may, after the words “ grant, bargain, &c.” “ surrender and yield up” to the purchaser, his heirs and assigns,” which will have the same effect,—or the operative words for conveying the term may be in this form, “ hath remised, released, surrendered and “ yielded up, bargained, sold, assigned, transferred, and “ set over.” In such a case, as the validity of the surrender

Of outstanding terms.

Merger of outstanding terms.

CHAP. VII.  
SEC. I.

depends entirely on the acceptance of the surrenderee, it is proper to insert the words, "and upon the acceptance of the said [*surrenderee.*]"

Assignment of " of the said [*surrenderee.*]"

outstanding terms to attend. Where it is thought proper to assign several terms in trust to attend, this may be done by one deed, in which, after the creation of the several terms has been stated, the recitals may proceed as follows :—

Recitals in the assignment of several satisfied terms to attend. **AND WHEREAS** the said pieces or parcels of land, tithes and other hereditaments comprised in the said several hereinbefore in part recited indentures of release, or some part or parts thereof, are, together with other hereditaments, subject to the residue now to come and unexpired of a term of two hundred years, created by an indenture bearing date, &c.

**AND ALSO** to the residue now to come and unexpired of a satisfied term of one thousand years, created by a deed poll bearing date, &c.

**AND ALSO** to the residue, &c. of a satisfied term of five hundred years, created, &c.

**AND ALSO** to the residue, &c. of a term of two thousand years, created, &c.

**AND ALSO** to the residue now to come and unexpired of a satisfied term of ninety-nine years, determinable on the lives of, &c. and the survivor of them, created by an indenture, &c.

**AND WHEREAS** under or by virtue of divers mesne assignments, and acts in the law, and ultimately, &c. [*recite the various circumstances, deaths, &c. necessary to show in whom the terms are now vested.*]

Conveyance by the assignees of bankrupts.

On a conveyance by assignees of a bankrupt, the bankrupt should be made a party, as he can now, under the last Bankrupt Act (1), be compelled to join.

The commission, and bargain and sale from the commissioners, must be recited. The estates of bankrupts, and those vested in trustees, are usually sold by public auction, to prevent any question as to the fairness of the sale; and, therefore, where the estate is sold by private contract, after having been previously exposed to sale by public auction, this circumstance should be noticed by a recital, "that the said premises having been exposed for sale by public auction without effect, and the assignees being desirous to bring the affair to a conclusion, have contracted with the purchaser for the sale to him of the aforesaid premises." There should also be a recital that the purchase-money is to be paid to the assignees, "to be by them applied and disposed of pursuant to the trusts and directions of the bargain and sale." The assignees convey by the same words as trustees. The covenants are, by the assignees, that they have done no act to incumber; and, by the bankrupt, for title in the usual form.

When an estate is vested in trustees to be sold, the instrument creating that trust should be very fully recited, as to the power of sale, and the proviso that the receipts of the trustees shall be good discharges to the purchaser: the trusts of the purchase-money should not be detailed, but it will be sufficient to refer to them generally in words to this effect:—"In trust to apply the money arising from such sale in the manner and for the purposes in the said recited indenture contained." If it happen that, in the instrument creating the power of sale, the clause, that the receipt of the trustees shall be good discharges, is wanting, and the circumstances of the case impose on the purchaser the obligation of seeing to the application of the purchase-money,

Conveyance  
where an estate  
is vested in  
trustees to sell,  
&c.

CHAP. VII.  
SEC. I.

the interests of the persons entitled to receive it must be shewn, and they must be made parties to the deed.

If the money is paid to the trustees, it must be expressed to be paid to them for the purpose of being "paid, applied and disposed of pursuant to the trusts and directions of the said recited indenture." The trustees must convey in the usual form, but they only covenant that they have done no act to encumber.

Where there is a contract between the *celles que trust*, this contract should be stated, for thereby the trustee becomes a trustee for the new *cestui que trust*, and the *cestui que trust* who has parted with his beneficial interest need not to be made a party to any subsequent dealing with the property, though it is usual to make him join. Thus, if *A* be trustee for *B*, and *B* sells his interest to *C*, on proof of the payment of the purchase-money by *C* to *B*, *A* may safely convey to *C* without the concurrence of *B*. If *C* had not paid the purchase-money, then a judgment against *B* would be a lien on the unpaid purchase-money.

Conveyance to trustees, on their investing trust-money in the purchase of lands.

On the conveyance of an estate to trustees, empowered to invest trust-moneys in the purchase of lands, the instrument creating the trusts must be recited, and the uses to which the lands are to be conveyed should be set forth. As these uses are generally the same as the preceding limitations of the testator or settlor's real estate, these last must be set forth. The contract must then be recited, and the lands conveyed to the trustee, his heirs and assigns, "to and for the several uses, upon the trusts, &c. in and by the said last will and testament (or "said indenture of lease and release of, &c." if it be so) expressed of and concerning the "manors, messuages, &c. thereby devised (or 'settled'),

“ or to, for and upon such of the same uses, &c. as are  
 “ now existing, unsatisfied, unperformed, or undeter-  
 “ mined and capable of taking effect, or as near thereto  
 “ as may be, and the deaths of parties and other inter-  
 “ vening circumstances will permit.” The vendor, in  
 such a case, enters, of course, into the usual covenants  
 with the trustees; and if there be several funds in the  
 hands of the trustees, applicable to different purposes,  
 there should be a declaration for the purpose of showing  
 out of what fund the purchase-money was paid from,  
 in order to prevent any dispute arising as to the claims of  
 the parties severally entitled to these different funds.

Where trustees are directed, after the performance of  
 the trusts created by a will or settlement, to convey to  
 particular uses, in the conveyance pursuant to such di-  
 rection, the instrument creating the trusts should be re-  
 cited at length, and notice taken that the trusts are all  
 performed or satisfied, or determined, or become unne-  
 cessary. If the trusts were for payment of debts or le-  
 gacies, it may be stated that these have been discharged  
 and by what means. The trustees must then, “ in  
 “ pursuance and execution of the trusts reposed in them  
 “ by the will,” (if the instrument creating them be a  
 will,) “ convey to and for, and upon the uses, &c.  
 “ declared by the will.” The trustees, of course, only  
 covenant that they have done no act to incumber.

If, on the sale of lands, the legal estate be outstanding  
 in an infant-trustee, then the trusts having been all  
 performed, or been satisfied, or become incapable of  
 taking effect, upon an application by petition to the  
 Court of Chancery, a reference will be made to the  
 Master, to report whether the case comes within the  
 6 Geo. 4, c. 74, and, if so, the infant, under the provi-

Legal estate  
 outstanding in  
 an infant  
 trustee.

CHAP. VII.  
SEC. I.

sions of that act, will be directed to convey. If, however, the purchaser will consent to such an arrangement, the expense of this application may be avoided by the vendor's entering into a covenant to procure the infant-trustee to convey when he comes of age.

Recitals where the estate is vested in a trustee under a naked trust.

Where the lands intended to be conveyed to a purchaser, are vested in a trustee, under a mere naked trust, it is not necessary to recite the deed or instrument creating the same, but it is sufficient to say, that the person is a trustee for the vendor. The general practice, however, is to recite briefly the conveyance to the trustee, and the declaration of trust, and this practice cannot safely be departed from.

Of the conveyance or the sale of an estate by lots.

Where an estate is sold in lots, and there are outstanding terms, comprising the entire estate, the conveyance may be to a trustee, to the use of the purchasers under distinct limitations, and there may be a separate set of covenants with each purchaser, or one set of covenants with the trustee to uses, and the term may be assigned to one trustee for all the purchasers, as "to so much and such parts of the messuages &c., hereinafter mentioned to be hereby assigned, as are hereinbefore limited, TO THE USE of the said A, his heirs and assigns, and to be disposed of &c." If an assignment of the term in each lot to the several purchasers be thought the better course, it may be effected by assigning "so much and such part of the said messuages &c., comprised in the said term of &c. as are herein after limited, TO THE USE of the said A, his heirs and assigns &c." If the term in each lot is to be surrendered, the termor must "assign, surrender and yield up, so much and such part of the said messuages &c., hereinafter mentioned to be hereby released (or so

“ much and such part of the messuages &c., herein-  
 “ before mentioned to be hereby released, *or* so much  
 “ and such part of the messuages &c., comprised in the  
 “ term as are hereinbefore limited), TO THE USE of the  
 “ purchaser, his heirs and assigns, for ever, as aforesaid,  
 “ and all the estate &c., *habendum* to the purchaser, his  
 “ heirs and assigns, for the residue of the term, and  
 “ for and during all the other estate &c., of the trustee,  
 “ to the intent, that the now residue of the term may  
 “ be merged and extinguished in the freehold and in-  
 “ heritance of the same premises.”

CHAP. VII.  
 SEC. I.

A vendor is sometimes possessed of a term of years, and seised of the reversion therein in different rights ; in such a case it will be proper, on a sale of the estate, in the first instance, to assign the term to a trustee, in trust for the purchaser, and then, by a separate deed, to convey the fee. If he be tenant for life, with a power of appointing the reversion, he should first appoint the reversion, and then, by the same deed, he may afterwards convey the estate for life.

Conveyance by a person having a term, and the reversion in different rights.

Where an estate is sold by husband and wife, the wife being tenant for life, with a power of appointing the estate, reversion to her in fee, the conveyance should be by lease and release, and appointment and fine, for then, if the will, or settlement, under which she took, were lost, the conveyance would be good, under the ownership. If the husband and wife sell,—the property being the wife's, and part freehold, part copyhold,—the conveyance may be by one deed, the first operative part being a release of the freehold, the second, a covenant to surrender the copyhold, with a covenant to levy a fine. If the wife, instead of being tenant for life with reversion in fee, or being seised in fee, be tenant in tail,

Conveyance on sale of wife's estate, she being tenant for life with power of appointing the fee.

CHAP. VII.  
SEC. I.

then a previous recovery is necessary, and the tenant to the *præcipe* may be made by the husband alone, by lease and release, or bargain and sale enrolled, the freehold being in him by right of marriage. The fee simple of an estate is sometimes vested in several married women, as tenants in common; in such a case, to provide against the contingency of one of them dying and leaving an infant heir, by which the possibility of effecting a sale of the property, or a partition, might be postponed for upwards of twenty years, they should join with their husbands in conveying to trustees, in trust to sell with their consent and, that of their executors in case of any of them dying, and a fine should be levied to the trustees, for then a sale could be effected, whenever it might be deemed advantageous.

Covenants for  
title.

When the vendor is the first purchaser, the usual covenants for title are :—

1. That notwithstanding any act &c. by him, the said [*vendor*] and those under whom he claims, he is lawfully seised.

2. That he hath good right to convey.

3. AND THAT free from incumbrances, or otherwise, &c.

4. And that he will make further assurance.

Vendor's cove-  
nant that he is  
seised, &c.

Where the vendor has only a power of appointment, the first covenant is, that the power was well created, and is subsisting, and the other covenants are the same as those by a vendor seised in fee. Trustees, assignees &c. never enter into covenants for title, but only covenant that they have done no act to encumber. The purchaser is not entitled to covenants for title on conveyances by the crown,—nor on conveyances under the trusts of a will, or on the order of the Court of Equity, for the payment



of debts,—nor, in general, are there covenants for title in conveyances under private acts of parliament.

CHAP. VII.  
SEC. I.

These covenants must be confined to *his own act*, if the vendor have *purchased the estate himself*, or to his own acts *and those of the persons under whom he claims*, if the premises have come to him by devise, descent or settlement; for it has been long clearly established, that a vendor is not obliged to enter into covenants against all the world, and for this plain reason, that the covenants of former owners run with the land, and may be taken advantage of by a purchaser, in the event of a claim being made by or through any of them.

Against whose  
acts the pur-  
chaser shall  
covenant.

Where an estate is conveyed by several persons, who take their shares from different ancestors or owners, each grantor should covenant for his own acts, and the acts of the ancestor or owner under whom he takes his interest, which may be done in the following form:—“ And the  
“ said *A. B. C. D. E. F.*, [*the vendors*,] severally and  
“ apart, each for himself, his heirs, executors and ad-  
“ ministrators, and not jointly, or the one for the others  
“ or the other of them, nor for the heirs, executors and  
“ administrators, or acts of the others, or other of them,  
“ but each of them for his own acts only, and the  
“ said *A. B.*, for the acts of the said [*his father*],  
“ and the said *C. D.*, for the acts of the said [*his*  
“ *brother*], and the said *E. F.*, for the acts of the said  
“ [*settlor under whom he claimed*], &c.” By this mode,  
the covenants of each person are confined, in ordinary  
cases, to the title of the part he conveys, because the  
acts of his ancestor can concern nothing more.

It is sometimes the practice, where several persons join in a sale, for them to covenant for the title, “ to the  
“ amount of, and according to, the sums respectively re-join in a sale.

Covenants for  
title where  
several persons  
join in a sale.

CHAP. VII.  
SEC. I.

Effect of the words "promise and agree."

"ceived by them," or, in other words, as far as they severally have an interest.

In covenants, the words "promise and agree" refer to something future, and, consequently, are improper in covenants by trustees, assignees &c., that they have done no act to encumber, the proper words are "co-venant and declare."

Order in which ancestors should be named.

In covenanting against the acts of ancestors named in a deed, they should be named in the order in which they were seised, and the last seisin first, in this form :—"that, notwithstanding any act done by the said [*father*], by the said [*grandfather*], &c." But in titles taken under long pedigrees, it is only necessary to covenant against the acts of those who have been in *possession*, and not against the acts of those through whom the estate has *merely descended*, without ever having been in their possession.

In covenants for title, care should always be taken, to find out the person in whom the legal estate is vested, and then the owner should covenant "that he and that person are lawfully seised, &c."

With whom covenants shall be entered into.

All covenants, which run with the land, should be entered into with the parties to whom the conveyance is made, even when they are only trustees or releasees to uses; but such covenants as do not run with the land, and such as respect personal property, should be entered into with the *cestui que trust*, unless the trustee is interested on the behalf of several persons who are to enjoy the property, or to receive the produce as creditors.

Covenant for quiet enjoyment, and that free from incumbrance.

The covenants for quiet enjoyment, and that for freedom from incumbrance, are, properly speaking, one covenant; for it is obvious that the commencement of the

latter of them, "*and that free, &c.*" has reference to something which precedes, and is, in fact, the commencement of the second member of an entire sentence, and not in itself a separate independent clause. The total import of these two clauses, or, strictly speaking, separate parts of one clause, is, "that the purchaser shall "*not only* enjoy the estate without any let, suit, trouble "or disturbance from the vendor, *but also* free and clear "from all incumbrances at any time before or after to "be made or suffered by the vendor, and those persons "for whom he covenants." This covenant does not import that the estate is free from incumbrances, but only that the purchaser *shall enjoy* it free from incumbrances (1). The consequence of this difference is, that the covenant is not broken, although it should turn out that there are incumbrances, provided the purchaser have the undisturbed enjoyment of the premises; whereas, if the covenant were absolute and independent that the estate was free from incumbrances, the covenant would be broken, and the vendor liable to damages, as soon as any incumbrances should be discovered, although the parties entitled to the benefit of them were to make no attempt to disturb the purchaser's enjoyment. The words "*acts and means,*" in these covenants, import *something done* by the person against whom the covenant is made: The words "*permit and suffer,* import "that a party shall not concur in any acts over which he has a control :

The covenant for further assurance in mortgage- deeds does not compel the mortgagor to release his equity of redemption, but only to do all acts necessary

Covenant for  
further assurance.

(1) *Vane v. Lord Barnard*, Gilb. 7.

to confirm the mortgage (1). Whether, under this covenant, a purchaser is entitled to call on the vendor to covenant for the production of title-deeds, is a question which has recently undergone much discussion, but is still undetermined (2).

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## SECTION II.

### *Of the conveyance on the purchase of an estate subject to a mortgage.*

Part of the purchase-money to be secured by mortgage on the estate sold.

When, on the purchase of a freehold estate, part of the money is permitted by the vendor to remain on the security of the estate, or is borrowed of a third person, who is to be secured by a mortgage on it, the land may be conveyed by the vendor to the purchaser, "To the use of the intended mortgagee for a term of years, remainder to the purchaser in fee," or "to the use of the intended mortgagee, subject to the usual proviso for redemption." By either of these modes, the dower of the purchaser's wife, and judgments, crown debts, or other incumbrances of the purchaser, are prevented from attaching upon the estate, as it passes immediately from the vendor to the mortgagee, without having vested at all in the purchaser.

(1) *Atkins v. Uton*, 1 Ld. Raym. 36; S.C. Comb. 318.

(2) *Hallett v. Middleton*, 1 Russ. 243; *Fain v. Ayers*, 2 Sim. & Stu. 533.

If the estate is already in mortgage for a term of years, and is to be conveyed to a purchaser subject to the same mortgage, in that case the inheritance and equity of redemption may be conveyed to the purchaser, and a proviso inserted that, on payment to the mortgagee of his principal and interest, he shall assign or surrender the term, with a covenant from the purchaser for payment of the mortgage-money and interest. If it happen to be the intention of the purchaser to pay off the mortgage in a short period (say, for example, within a year or two), and the subsisting term is not necessary to be kept on foot after the mortgage has been paid off, the estate may be conveyed to the purchaser "To the use of the mortgagee for a new term, remainder to the purchaser in fee, with a proviso, that if the purchaser shall pay off the principal money and interest at the intended time of payment, the term shall cease and be void." The term, if the money be paid, will cease accordingly, and no assignment or surrender will be necessary, but care must be taken to preserve good evidence that the money was actually paid on the day stipulated, and for this purpose the endorsed receipt by the mortgagee for the money should be attested by two witnesses, and the attestation should state the fact, that the money was paid "on the day mentioned in the within-written proviso for the payment thereof." When, however, it is deemed proper to keep alive the old mortgage term, the conveyance should be by lease and release, conveying to the purchaser the inheritance and equity of redemption, and, by an assignment of the term to a trustee, "In trust, in the first place, to secure the mortgage-money and interest, and subject thereto for the purchaser and to attend the inheritance."

CHAP. VII.  
SEC. II.

Estate already  
in mortgage to  
be sold subject  
to it.

CHAP. VII.  
SEC. II.

Part of the purchase-money to be paid by instalments, and secured by mortgage of the estate sold.

If a purchase be made, and part of the purchase-money is to be secured on the premises for a certain number of years, with leave for the purchaser to pay off the purchase-money by instalments—the vendor, on the punctual payment of the instalments, not to be at liberty to call in the money for a certain number of years,—a term may be limited as above, with a proviso framed according to the agreement of the parties. It may be, for example, in some such form as the following :—

Proviso where the purchase-money is to be paid by instalments.

Provided, &c. that if, &c. the sum of £—— of lawful money current in England, with interest for the same, at the rate of £—— for every £100 for a year, by or in the instalments or shares, &c., and on or at the days or times following (that is to say) the sum of £——, being one part of the said principal sum of £——, together with a years' interest for the whole of the said principal sum of £——, at the rate aforesaid, on or before the day of \_\_\_\_\_, which will be in the year 18\_\_\_\_, the further sum of £——, together with a years' interest for the remaining sum of £——, at the rate aforesaid, on or before the \_\_\_\_\_ day of \_\_\_\_\_, which will be in the year 18\_\_\_\_, [*state in like manner the further instalments,*] without any deduction or abatement, out of the said several principal and interest-monies, or any of them, or any part or parts thereof respectively, for or in respect of, &c.

Proviso in default of payment of any instalments for rendering the whole payable immediately.

PROVIDED ALSO, and it is hereby, &c., that if at any time or times, while the said principal sum of £——, or any part thereof, shall remain and continue upon the present security, any one or more part or instalment, or parts or instalments, of the same principal sum and interest shall be in arrear and unpaid, during the space of [*forty*] days or more, next after the days or times hereinbefore appointed for payment thereof, then, and in any such case, and immediately thereupon, the said principal sum of £——, and interest, or so much thereof respectively as shall then remain due, shall no longer

be payable in the instalments, and at the times hereinbefore for that purpose appointed, but the whole of the same sum and interest, or of the residue thereof, then remaining unpaid, shall forthwith become and be payable to, and recoverable by, the said , his executors, administrators, or assigns, as a present debt, any thing herein, &c.

### SECTION III.

#### *Of the conveyance on the sale of lands subject to rent-charges, annuities, &c.*

Where lands are to be sold, subject to a rent-charge, and the person entitled to receive the same, is willing to join in the conveyance, it may be made, "to the use, intent, and purpose, that the said [*person entitled to rent-charge*] shall have, receive, &c. the rent-charge, &c. during his life, with a term of years limited to a trustee to secure the same" as in marriage settlements, —and, subject thereto, To the purchaser in fee, with a covenant from him for payment of the rent-charge, and a declaration that, subject to the said rent-charge, the term shall be In trust for the purchaser, and to attend the inheritance."

If the persons entitled to receive such rent-charge, or other yearly sum, refuse to join in the conveyance, then so much of the purchase-money as will produce an annual income equal to the rent-charge, may be lodged in the purchaser's hands on security of the estate. For the purpose of carrying this arrangement into effect, a term may be limited to the trustees, "In trust, out of the rents

CHAP. VII.  
SEC. III.

“ and profits of the proposed lands, to raise the annual  
 “ sum required, (being the interest of the money con-  
 “ tinued on the aforesaid security,) and to pay the same  
 “ to the annuitant, by half-yearly payments, (or other-  
 “ wise, if so, according to the tenor of the grant,) in  
 “ satisfaction of the annuity ; and after the death of the  
 “ annuitant, In trust, by mortgage or sale, to raise  
 “ and pay the principal and interest to the vendor, or his  
 “ executors, &c. ;” or a term may be limited “ to the  
 “ vendor, his executors, &c., with a proviso, that if the  
 “ purchaser shall pay an annual sum equal to the  
 “ rent-charge, during the life of the person entitled to  
 “ it, and the principal lodged on the security of the  
 “ estate, at the end (say) of six months after the death  
 “ of the annuitant, the term shall cease.” The first,  
 however, is the better mode of attaining the object here  
 proposed.

It will often happen, with a view to keeping the title  
 to the estate clear and free from extraneous matters, that  
 the trusts of the money, retained for the payment of the  
 money, should be declared by a separate deed.

Indemnity  
 where the title  
 is defective  
 from want of  
 evidence of  
 annuitant's  
 death.

Where a title is objectionable, on the ground of want  
 of evidence of the death of some person abroad, who has  
 a charge on the land, (say, for example, an annuity,) and  
 who has not been heard of for many years, it may be  
 stipulated that a part of the purchase-money shall, for a  
 certain term of years, remain in the purchaser's hands, at  
 interest, as an indemnity against the annuity, and a term  
 may be limited to trustees, “ In trust, by mortgage, or  
 “ out of the rents and profits of the estate, to raise, at  
 “ the end of the period agreed upon, the sum so con-  
 “ tinued, and to pay the same to the vendor, his exe-  
 “ cutors, &c. ; and, upon further trust, out of the rents



“ of the premises comprised in the term, to raise a  
“ yearly sum equal to the interest of the said sum, and  
“ to pay the same to the vendor,” at such times as may  
be agreed on. There must be a proviso for the indemnity  
of the purchaser, out of the money in his hands, in case  
of any claim being made by the annuitant, and the usual  
direction for the payment to the purchaser, of the sur-  
plus of the rents remaining after performance of the  
trusts, and for ceasing the term when the trusts shall  
have been performed.

On the sale of lands which are subject to the payment of portions, or legacies, to infants, the amount of them must be retained by the purchaser, and a term be created, or an estate in fee vested, in trustees, “ In trust to raise  
“ such a sum of money as is equal to the total amount  
“ of the legacies, and to pay the same to the persons,  
“ and in the proportions following, (that is to say,) To  
“ the [*legatees*] as and when they shall respectively  
“ attain their several ages of twenty-one years, with  
“ interest, in the mean time, for their maintenance.”  
Or the trusts may be declared thus:—“ In trust, by  
“ mortgage, or sale, to raise, levy, and pay to the  
“ [*legatees*] such and such sums of money, in satisfac-  
“ tion of their several legacies, the same to be paid to  
“ them when and as they respectively attain twenty-one  
“ years, with interest in the mean time after the rate of  
“ £—— per cent. per annum.” The declaration of  
the trusts varying, of course, and being made, in each  
case, conformable to the tenor and effect of the settle-  
ment, or will, under which they were granted.

Thus, if the legacies are to sink in the land, in case  
of the legatees dying under the age of twenty-one years,  
then the trust must be to “ raise and pay the legacies to

Estate to be  
sold subject to  
payment of  
portions, &c.

CHAP. VII.  
SEC. III.

“ the legatees, as when and in case they shall attain  
“ that age, with interest for maintenance; but if any of  
“ them shall die under twenty-one, In trust, in that  
“ case, to raise and pay to the vendor such a sum as  
“ shall be equal to the lapsed legacy, with interest  
“ from the death of the legatee.” If it be doubtful,  
whether the legacies vest before twenty-one, that doubt  
should be stated, and the parties may agree, that “ if  
“ any of the legatees shall die under twenty-one, and  
“ that by the rules of equity their legacies shall be  
“ deemed vested interests, the trustees shall, in that  
“ case, out of the purchased premises, raise such sums of  
“ money as shall be sufficient to pay the same to the  
“ executors of the legatees so dying, with interest ; but  
“ that if the legacies shall be deemed to be lapsed, then  
“ that the trustees shall, out of the purchased premises,  
“ raise and pay to the vendor, so much money as shall  
“ be equivalent to the lapsed legacies, with interest.”

When the  
estate is sub-  
ject to the pay-  
ment of an an-  
nual sum in  
perpetuity.

If an estate is charged with the payment of an annual sum in perpetuity,—as for example, to a school, or the poor persons dwelling in a certain township,—and such estate is to be sold in lots, and the annual sum, or other payment, is to be charged on a particular part of the lands, it may be secured, by way of rent-charge, to two or more trustees, who may be directed to pay it to the persons entitled. Where the annual payment is considerable, a term may be limited for the better securing it, and for indemnifying the purchasers of the other parts.

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# SECTION IV.

## *Of the conveyance of leasehold for lives.*

On examining the title to this kind of property, it is necessary to see that the new leases have always, either by deed or by act of law, been surrendered: it will frequently happen that a person, after mortgaging his estate on the dropping of a life, renews the lease in his own name, and that thus two interests are subsisting at the same time, in the same property.

Title to leaseholds for life.

If these two interests, however, are both conveyed to, and united in, the purchaser, the estate in possession will merge in the estate in reversion,—(that is) the interest acquired by the vendor in the new lease,—and the title will then be made good.

It frequently happens, particularly when an estate has been long in a family, that the owner has no title-deeds to produce, the old leases having been all delivered up at the time when new ones were granted; in such a case, the title may be made out by copies of leases, to be obtained from the register books of the bishop, &c. by whom they were granted.

Mode of making out the title, where the old leases are lost.

Entails in leasehold lands may be barred, by a fine *sur concessit*,—by alienation by deed, (that is) by conveyance and reconveyance, (for, perhaps, a conveyance to the use of the owner would not be sufficient),—or even by tenant in tail surrendering the old lease, and taking a new one.

Mode of barring entails of leaseholds for life.

As leaseholds for lives, when intended to be entailed, ought always to be vested in trustees, In trust to raise

CHAP. VII.  
SEC. IV.

and pay the rents, and renew the lease, &c., if the tenant in tail, on attaining twenty-one, wish to bar the entail, he may execute a conveyance to a trustee of his equitable estate, and may take a reconveyance to himself from the trustees; but if a fine *sur concessit* be thought more advisable, the tenant in tail must convey to a trustee, "To the use of himself for and during the "natural lives, &c.," and covenant to levy a fine, and the intention of barring the entail may be expressed, both in the conveying part of the deed, and in the covenant to levy the fine. After the conveyance, and the reconveyance, have been executed, or (in case the other mode be adopted) after the conveyance "To the use of "the tenant in tail" has been executed, and the fine levied, he may call upon the trustee, in whom the legal freehold is vested, for a conveyance thereof to himself for the lives named in the subsisting lease, in the same manner as the tenant in tail of an equitable estate of inheritance may, after suffering a recovery, call upon the trustee of the legal estate to convey to him in fee.

Recitals necessary in deeds to lead the uses of fines of leasehold for lives.

Although recitals are not, in general, necessary in deeds to lead the uses of fines and recoveries of lands of inheritance,—because as well the entail last created, as all former entails, (if any be existing,) are intended to be barred,—yet, in respect to leaseholds for lives, it is necessary, on account of the limited interest to be conveyed, to recite or refer to the lease subsisting, when the deed or will creating the entail was executed, and to recite such deed or will; and if the lease has been since renewed, the new lease must be also recited, and notice must be taken that it was granted to the trustee, "upon "the trusts declared by the deed (or will) creating the "entail;" after which notice may be taken that the

tenant in tail has attained the age of twenty-one years; and then the Indenture witnesseth, "that for the bar-  
"ring and extinguishing all estates tail, and remainders,  
" &c. created or limited by the said recited indenture  
" (or will,") the tenant in tail conveys to a trustee,  
*habendum* (if a fine *sur concessit* is not intended to be  
levied) "to the trustee, his heirs, and assigns, for and  
during, &c." without any declaration of trust in favour of  
tenant in tail; and by a deed, dated the next day, with  
the same recitals as in the former deed, followed by a  
statement of its contents, and a recital afterwards, "that  
"that deed, and the conveyance thereby made, were so  
"made to and in the name of the trustee, in trust for  
"the tenant in tail." The trustee, "in execution and  
"performance of the trust reposed in him," must convey  
to his *cestui que trust* for the existing lives, and the  
trustee must covenant that he has done no act to en-  
cumber.

In conveying leaseholds for lives, the subsisting lease must be recited; and if it has not been made to the vendor, but to a former owner, or to a trustee or mortgagee, some notice must be taken of the intermediate conveyances which derive the property to, and vest it in, the vendor: if all these intermediate conveyances are in the hands of the latter, and can be given up to the purchaser, it may be sufficient to state, "that by virtue  
"of divers conveyances and assignments in the law, the  
"land comprised in the lease has become vested in the  
"vendor for and during the natural lives of, &c. and the  
"life of the longest liver of them; and that he has  
"contracted to sell the same to the purchaser, for and  
"during the natural lives of, &c., and for and during all  
"the other estate, term and interest of the vendor."

Conveyance of  
leasehold for  
lives.

CHAP. VII.  
SEC. IV.

these latter words apply to the renewable interest or tenant-right.

Form of the deed, where the conveyance is from a devisee.

Where the conveyance is to be taken from a devisee who has renewed the lease in his own name (particularly in a small purchase) the formal recital of the subsisting lease at the testator's death may be omitted, and it may be stated, "that the testator being seised of, or entitled to, the lands after described and mentioned to be conveyed by virtue of or under a lease, bearing date, &c. to him thereof, granted by, &c. made, and duly executed his last will, &c.," after stating the contents of which, the subsisting lease may be recited. For the acceptance of a lease for three lives, (whether the two old lives remain in it or not,) by the person who had the former interest, is equally a surrender of the former interest, as the acceptance of a lease for a longer term to begin immediately is a surrender in law of the former interest. But it is usual for bishops and ecclesiastical corporations to take a surrender by deed, on the renewal of a lease for lives, though not so on the renewal of a lease for years.

Effect of a renewal after a will made.

If lessee for lives devise his estate, and afterwards renew the lease, it is considered as a new purchase, and does not pass by the will; but if the leasehold lands be devised in general terms, they will pass by a republication of the will; the safest way, however, is to make a will, reciting the new lease, and to devise the lands to the trustees in the will upon the trusts declared by it.

Operative words and parcels in the conveyance of leaseholds.

The premises must be conveyed by the same words as lands held in fee simple, and the parcels may be described either by a reference to the recited lease, or the description therein may be repeated, according to circumstances, but it must be closely adhered to. The *habendum* must be to the purchaser, "his heirs and assigns, for and

“ during the natural lives of, &c. To the use of the purchaser, his heirs and assigns, for and during the natural lives, &c.”

CHAP. VII.  
SEC. IV.

Some conveyancers omit the words “ for and during the natural,” &c. either after the *habendum*, or after the use, but they seem proper to stand in both places. If leasehold lands are conveyed to A. B, his heirs and assigns, To the use of him, his heirs and assigns, for and during, &c., there is an apparent contradiction in the deed, the *habendum* importing a conveyance in fee, which is afterwards restrained by the limitation of a use *pur autre vie* and *vice versa*. If the words “ for and during, &c.” are to be left out in either place, it seems proper to omit them after the use.

The lands must be conveyed, subject to the payment of the rents, and the performance of the covenants of the lease. If a married woman has an interest, a fine *sur concessit* must be levied, the vendor must covenant, that notwithstanding any act, &c. by him, the lease is valid ; that he hath power to convey for and during the natural lives, &c.,—for peaceable enjoyment, and that free from incumbrances, except the rent and the covenants in the lease,—and for further assurances.

The conveyance must be subject to the payment of rent, &c.

If lands comprised in one lease are sold to two or more purchasers, the same mode of conveyance must be adopted (regard being had to the different nature of the property) as has been already described with respect to the conveyance of freehold of inheritance.

Precautions to be observed where leasehold is sold in lots.

There should, however, (and this observation applies as well to leasehold for years as leasehold for lives,) be an agreement inserted to obtain separate leases for each lot, under a reservation of certain parts of the entire annual rents, and the other usual agreements as to renewals

&c. in the mean time, till separate leases shall be obtained. It should also be stipulated, if separate leases are not to be applied for, or in case such application shall not be obtained, in what proportion the reserved rents, and fines of renewal, are to be paid; and that the new lives to be inserted shall be nominated by the purchasers in rotation, every nominee to be above such an age (suppose fifteen years), and under such an age (suppose twenty-five years), with an agreement, that in case the person to whom the right of nomination shall belong, shall, for the space of fourteen days after the dropping of a life, neglect or refuse to nominate a new life, such as before agreed upon, to be added to the two continuing lives, the right of nomination shall, on such renewal, devolve upon the person who is entitled to the next turn or right of nomination, and so on.

There should also be an agreement as to the person with whom, on every renewal, the lease should be deposited, which, where the shares are equal, may be with the person on whose nomination of a life the new lease shall be made, but the lease must be agreed to be produced to the other owners.

In cases where all the lands comprised in the lease are assessed together to parliamentary and parochial taxes, there should be an agreement in what proportion the assessments are to be paid.

On a purchase of leasehold for lives, where a previous application has been made to the bishop, &c., and his consent obtained to grant separate leases, the lands may be conveyed to trustees, "In trust as to the different lots for the several purchasers, each lot being subject to such a proportion of the reserved rent as may be agreed on, with a clause that the subsisting leases shall be



“ surrendered, To the intent that the bishop, &c. may  
 “ be enabled to regrant all the premises to the respective  
 “ purchasers thereof, by such a number of leases in the  
 “ portions and shares, and subject to the rents, reserva-  
 “ tions and agreements, before specified.”

CHAP. VII.  
 SEC. IV.

If leaseholds for lives are intended to be mortgaged at the time of the purchase, they may be conveyed, “ In  
 “ trust out of the rents and profits of the premises, to  
 “ pay the rent reserved by the present lease, to perform  
 “ the covenants therein contained on the lessee’s part  
 “ (for these covenants may be to repair the premises),  
 “ and to renew the lease ; and out of the rents and pro-  
 “ fits, or by mortgage, to raise and pay the fine, fees and  
 “ expenses attending every renewal ; and, subject to these  
 “ trusts, the trustees to stand seised and interested of and  
 “ in the premises during the terms and interests granted  
 “ by the then subsisting and all future leases, In trust,  
 “ by mortgage or sale, to raise the mortgage-money and  
 “ interest at a given day, and, subject thereto, in trust  
 “ for the purchaser.”

Mortgage of  
 leasehold for  
 lives.

Leaseholds for lives may be conveyed by feoffment or bargain and sale inrolled, as well as by lease and release, and they may also be demised for a term determinable on the death of the ultimate survivor of the three lives named in the lease ; but if it should be surrendered by the lessor the term would be at an end. Estates *per autre vie*, are, by the statute of frauds, made deviseable by will, attested by three witnesses, and, if not devised, are chargeable as assets by descent in the hands of the heir, if they shall come to him by special occupancy (that is, where the lease or grant is made to the lessee and *his heirs*) ; and in case there shall be no special occupant, (that is, where the lease is made to the lessee

Different  
 modes of con-  
 veying lease-  
 holds.

Leaseholds for  
 lives deviseable,  
 and chargeable  
 as assets by  
 descent.

CHAP. VII.  
SEC. IV.

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only, without mentioning his heirs,) they shall go to the executors or administrators of the grantee, and shall be assets in their hands. Before this statute, if the grantee *per autre vie*, had died during the life of the *cestui que vie*, (or him for whose life the lands were holden,) they were subject to occupancy, or, in other words, to be seised by the first person who could enter. (1)

Leasehold for  
lives not sub-  
ject to dower.

Leaseholds for lives not being estates of inheritance, are not subject to dower, nor to a tenancy by the curtesy, neither are they within the statute *de donis*, and, therefore, not capable of being strictly entailed; but only limitations in the nature of estates tail can be made of them.

In limitations of leaseholds for lives, in the nature of estates tail, the heir in tail takes as special occupant. If property of this kind be conveyed or devised to a man, his executors, administrators and assigns, it will be considered as personal estate in him and go to his executors.

(1) See also Statute 14 Geo. 2, c. 20, by which the surplus of the estates *per autre vie*, after payment of debts, is made distributive like a chattel.



## CHAPTER VIII.

### OF ASSIGNMENTS.

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1. *Of the assignment of long leaseholds on a sale of them.*
  2. *Of the assignment on sale of lands held by a lease for years under ecclesiastical corporations.*
  3. *Of the assignment of attendant terms.*
  4. *Of the assignment of choses in action &c.*
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#### SECTION I.

##### *Of the assignment of long leaseholds on a sale of them.*

The points to be attended to on behalf of the purchaser, as to the title to this kind of property, are, that the purchaser have delivered to him, or at least have the means of coming at, the original lease,—that there have been a regular series of assignments or other transmissions of interests, by marriage, bankruptcy, &c.,—and that the administrations have been granted by the proper ecclesiastical courts.

It frequently happens, that the *original* lease, or some of the *intermediate* assignments of long leasehold, are lost or cannot be come at. In such cases, Mode of proceeding where the original lease is lost.

CHAP. VIII.  
SECT. I.

it is very common and advisable for the termor to create a new term by demise, equal in duration to so many years of the old lease as are unexpired, which term will, in process of time, become the foundation for a new title; for as the law presumes every person in possession to be seised in fee, the grantor's being in possession, and the execution of the deed, are all that are necessary to be proved; but it is proper, also, by a deed bearing date the day after, to take an assignment of the old term to the purchaser, or a trustee for him,—care being taken to keep the two instruments perfectly distinct. This mode of assurance is particularly useful in the case of a mortgage of long leaseholds, where, otherwise, the mortgagee, if he would bring an ejectment, must prove the original demise, and some, probably, of the mesne assignments, wills, &c., deriving the title to himself, which would always be attended with much difficulty, and would, in many cases, be impossible. (1)

General form  
of the assign-  
ment.

It is sufficient, in the assignment, to recite the original lease, which should be done a good deal at length, and with great accuracy, and then to take notice, that by divers mesne assignments, and other acts, good and valid in the law, the premises have been derived to,

(1) See *Earl v. Baxter*, 2 Sir W. Blackstone's Rep. 1228, where a plaintiff producing the original lease, and proving possession in himself, and those under whom he claimed for seventy years, all mesne assignments were presumed: At the present day, the law of presumption, as to the assignment and merger of terms, is in so unsettled a state, that it is difficult, or rather impossible, in any given case, to say whether the courts would or would not presume the assignment or surrender of a term. See the modern cases on the subject stated, 1 Atk. Conv. p. 89. It may be observed also, that it is at length settled by express decision, that a deed thirty years old, may be given in evidence without any proof of the execution. (*Doe d. Oldham v. Wolley*, 8 Barn. and Cress. 22.)

and are now in, the possession of the assignor. The contract should then be stated, and the lands assigned to the purchaser or mortgagee, *habendum* for the residue of the term, subject to the reserved rent, with a covenant that the lease is good and valid, and the other usual covenants.

CHAP. VIII.  
SEC. II.

As leaseholds cannot be made inalienable for a longer period than a life or lives in being, and twenty-one years afterwards, the title to them is seldom defective, except from the want of deeds, or from administrations having been improperly granted.

The most usual defects in title to long leaseholds.

## SECTION II.

*Of the assignment of lands held by a lease for years under ecclesiastical, or other corporations.*

With respect to leases by hospitals, ecclesiastical corporations, &c. who have an inalienable estate as to the inheritance, and powers of leasing under act of parliament, and also as to lay corporations who have notoriously been the owners for a long series of years, the practice is, to require no evidence of title beyond that of the lessee. Where the lease is made under enabling statutes, it must be seen, that the former leases were duly surrendered by the person competent to do so, and that the lease in all respects pursues the circumstances prescribed by the power under which it was granted. For the purpose of ascertaining that the lease had been duly surrendered, the legal title must be traced without any regard to the equitable ownership. Suppose, for

Title to leasehold for years, held under ecclesiastical and other corporations.

CHAP. VIII.  
SEC. II.

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instance, that under the statute of Hen. 8, three leases are granted in succession for forty years, on renewals made by different deans. The second lease might have been made before the commencement of the last year of the lease, there having been no surrender, actual or implied, of the first lease; the lease would be defective under the statute, there having been no surrender, and the lease not being within one year of its expiration. The third lease might be granted after the first had expired, and before the commencement of the last year of the second,—this also would be valid only on the ground that the first lease had expired and the second was void.

Where there is *tenant-right*, the title should be traced back as far as there is notice of trusts.

Leases of this description are frequently the subject of settlement, the renewals being obtained under the claim of *tenant-right*. If it happen that a renewal is obtained by a stranger, or other person, not entitled to this privilege, he will only be a trustee for the person so entitled. It is necessary, therefore, that a purchaser should trace the title as far back as he has notice of any trusts, except the period, over which they reach, extends beyond sixty years, for after the lapse of sixty years equity will not notice them.

It will be necessary, on examining the title, to see that the leases have been uniformly granted to the persons who had the former interest; if they have not been so granted, and two interests are subsisting at the same time in different persons, suppose, for instance, in a mortgagor and mortgagee (the former having renewed in his own name after the mortgage was made,) the title is defective; but it may be made good by the term in possession or the interest under the old lease being merged in the term in reversion granted by the new lease, by being assigned to the same person.

It is proper also to see whether the wills have been proved, for though the only case where the probate of a will is essential to a title is where an executor of an executor is assigning, yet some conveyancers refuse to accept a title from an executor, unless he himself have proved; and, therefore, in point of caution, the will should to be proved. Care should also be taken to ascertain that the administrations have been granted by the proper ecclesiastical courts; for an administration from an inferior court is void, if there be *bona notabilia* in two dioceses; but if it happen that a prerogative administration have been taken, and there are not *bona notabilia* in two dioceses, it is *not void*, but *voidable* only, by sentence or complaint from the inferior ecclesiastical court.

CHAP. VIII.  
SEC. II.

As to the probate of wills, in deducing the title to leaseholds.

It is, in most cases, sufficient, in the assignment, to recite the subsisting lease, and if it be upon any trusts, to state them; and after reciting the contract of sale, to assign for the residue of the term, subject to the reserved rent. The assignor should covenant that the lease is a good one, and not surrendered, or become void or voidable, by way of precaution against any act that may have been done to incur a forfeiture. The assignor must covenant only so far as regards the duration of the interest he has sold in the existing lease; he has nothing to do with any renewed interest, and, therefore, when the subsisting lease is surrendered by the purchaser on a subsequent renewal, the covenants, generally speaking, are at an end. If the rent reserved be considerable, and the purchaser have no means of satisfying himself whether it has been duly paid, and whether there be any arrears, a covenant may be inserted, that the rent has been duly paid up to a given time.

General form of the assignment.

CHAP. VIII.  
SEC. III.

Purchasers'  
covenants.

In many cases the purchaser covenants that he will pay the rents, and perform the covenants contained in the lease on the part of the lessee or assignee, and will indemnify the assignor therefrom. When this is the case, it seems proper that, there should be a duplicate of the assignment, and a bond should be given for payment of the rent and performance of the covenants, &c.

Of the sale of  
leasehold in  
lots.

Where there are two or more purchasers of land comprised in one lease, which is sold in lots, the premises may be assigned to trustees, In trust, to renew the lease, and by mortgage or sale to raise the fines, fees and expenses; and, subject thereto, as to such and such lands, In trust, for one purchaser, and, as to the rest, In trust, for another, &c. In such a case, the covenants may be with the trustees, or there may be separate covenants with each purchaser. And it may be stipulated what proportion of the fines, fees and expenses shall be raised out of one lot, and what out of the other; but the trusts must be to raise them out of the lands in general, and if, on a renewal, one purchaser should refuse to raise his quota, his lot may be mortgaged, or part of it sold, for this purpose; and the covenants should be with the trustees, that they may run with the land.

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### SECTION III.

*Of the assignment of terms to attend the inheritance.*

Recitals in the  
assignment of

On the assignment of terms to attend the inheritance, it is sufficient to state the original creation of the term,



which may be done pretty much at length, and to take notice, “ that the reversion, freehold and inheritance of the premises therein comprised, have become vested in the owner ; and that by virtue of divers mesne assignments, &c. the premises comprised in the term have become vested in the trustee, for the residue thereof yet to come and unexpired, In trust, for the owner of the fee, and to attend the inheritance.” The conveyance of the fee must then be recited, and the premises assigned to a new trustee, in the case of a purchaser, In trust, for him, his heirs and assigns, to be disposed of as he or they shall direct or appoint ; and, in the mean time, to attend the reversion, freehold and inheritance of the said premises therein comprised, to protect the same from all mesne charges and incumbrances, (if any such there be,)—And in the case of a mortgage, “ In trust, in the first place, for better securing to the said [*mortgagee*,] his executors, administrators, and assigns, the repayment of the said sum of £——, with interest thereon, at the time or times, and in the manner appointed by the said recited Indenture of mortgage, for the payment thereof, and for that purpose to be disposed of by the said [*mortgagee*,] his executors, administrators, or assigns, as the said [*mortgagee*,] &c. shall from time to time direct and appoint ; and after payment of the said sum and interest, and, in the mean time, subject thereto, In trust, for the said [*owner*,] his heirs and assigns, to attend, wait upon, and be subservient to the reversion and inheritance of the said premises, in order to protect the same from all mesne charges and incumbrances, (if any such there be.)” And, lastly, in the case of marriage or other settlements, or convey-

CHAP. VIII.  
SEC. III.

attendant  
terms.

Trusts of the  
term, on a sale.

Trusts of the  
term, on a  
mortgage.

Trusts of the  
term, on a  
settlement.

CHAP. VIII.  
SEC. III.

anee to uses, or upon trusts, the term must be directed to be assigned, " In trust, nevertheless, for the said [           ,] his heirs, appointees and assigns, and to be assigned and disposed of, &c. ; and, in the mean time, " to attend, and be subservient to the reversion, freehold and inheritance of the same, &c. according to the several uses, trusts, ends, intents and purposes hereinbefore limited, expressed and declared of and concerning the same, and in aid or support thereof: And for the benefit of the several persons entitled, or to be entitled under such uses, trusts, ends, &c., in order to protect the same freehold, &c. from and against all charges and incumbrances, (if any such there be,) mesne and subsequent to the creation of the said term."

Effect of the words "assigned and surrendered."

If a term be assigned by the words "assigned and surrendered," to the owner of the fee, and it cannot, from the intervening of some mesne estate, merge in him at the time, it will continue a distinct interest till he conveys the fee; but, upon executing a conveyance of the fee, the term passes at the same time, and will be merged in it.

Assignment of several terms.

Where there are several terms vested in separate trustees, and the intention is to keep them outstanding, they should, on a new assignment, be assigned to several trustees, in order that they may be kept separate; but where two or more terms have been already vested in one trustee, on the assignment of them to a new trustee, the *habendum* should be, "To have and to hold to the said [trustee] &c. for and during the now residue of the said several terms, &c. or such of them as is, or are, now subsisting."

Deduction of the title to an attendant

Where an assignment of a term is wanted, and the deduction of title to the person in whom it is vested is

through a chain of executors, the wills of the several testators must *all* have been proved in the *same* inferior ecclesiastical court where the will of the *first* testator was proved, or the title will be defective. So if the will of the first testator was proved in the Prerogative Court, all the subsequent probates must be taken out of the same court, to transmit the term: if any of them have been taken in an inferior ecclesiastical court, and the executor be living, the will may be brought into, and proved in, the Prerogative Court.

CHAP. VIII.  
SEC. IV.

term, through  
executors.

Where several executors have proved a will, as each entirely represents the testator, so each may of course assign or surrender a term, which, as such executor, has become vested in him.

Although, on any dealing with the inheritance, the old trustee of the term may be declared to stand possessed thereof, "In trust, &c." yet it is the practice of the most eminent conveyancers to require an actual assignment to a new trustee, and this practice cannot prudently be departed from.

There should  
always be an  
actual assign-  
ment to a new  
trustee.

#### SECTION IV.

##### *Of the Assignment of choses in action, &c.*

Bonds, and other choses in action, which are not assignable by law, are yet transferable in equity, which considers the assignor a trustee for the assignee. On the assignment of a bond, notice must be given to the

Assignment of  
choses in  
action.

CHAP. VIII.  
SEC. IV.

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obligor (1). Therefore, in the cases of money due on bond, the action to recover it must, notwithstanding the assignment, be brought in the name of the original obligee, and, for that reason, a power of attorney to sue in his name should always be inserted in the assignment. Book debts, and sums of money due on contract, are *choses in action*, and, though assigned, must be sued for at law in the name of the original creditor, though, in equity, the assignee sues in his own name. If the plaintiff in an action obtains a *feri facias*, and attaches the goods of the defendant, they may be assigned to him by the sheriff, after an appraisement, in satisfaction, or in part satisfaction, of his debt. On the determination or dissolution of a partnership, one partner may assign his share in the partnership debts and effects to the other; but, as they are joint-tenants, the word "release" should also be made use of; indeed that word alone would pass the whole interest to the party, but the debts of the partnership must be sued for in the name of all the partners. Sums of money due on turnpike securities, corporation bonds, and canal shares, will, generally speaking, pass by assignment: with respect to canal shares, they are sometimes, by the act making the canal, declared to be real estate, and the form of the transfer is usually prescribed by the act.

Legacies, &c.  
how far assign-  
able.

Legacies, and sums of money due on mortgage, are so far considered as capable of being completely assigned, as that, on payment of the money, the release or discharge is taken from the assignee only; and, after an assignment of money due on mortgage, where the estate remains vested in the assignor, he becomes a trustee for

(1) 1 Buck, 300.

the assignee without any express agreement for that purpose, though it is always proper to insert one. If a bankrupt is entitled to the interest of a sum of money for life, placed out in the funds, or on real or other securities, his assignees may transfer the interest to a purchaser, during the bankrupt's life, by an assignment of "the interest or dividends, and yearly proceeds arising or resulting from the money from time to time during the life of the bankrupt, and all the right, title, interest &c. of the assignees, *habendum* to the purchaser, his executors, &c. for his own use and benefit."

If a legacy be payable to a person abroad, a power of attorney is usually given to enable some one in England to receive and give a discharge; but this is not a safe method, for the party who granted the power may revoke it (every power of attorney being in its nature revocable at pleasure),—or he may die before the discharge for the legacy be executed,—in which case, as the power would be determined, the discharge would be void. The safe and proper method is, for the legatee abroad to assign the legacy to some person in England, "To the intent and purpose that he may be qualified and enabled to receive the legacy, and to make and execute a sufficient release and discharge for the same;" or "upon trust to receive the money and give discharges for the same, and stand and be possessed thereof in trust for the legatee, his executors, &c." with a letter of attorney to give discharges, &c., and a proviso "that the person paying shall not be bound to see to the application of the money."

In this case, if the legatee should die before the legacy is paid, and release given, still, the whole interest

CHAP. VIII.  
SEC. IV.

and property of the legacy being vested in the assignee, he would be capable of receiving and releasing it.

In some circumstances, it is advisable for the owner of the lands, charged with a legacy or sum of money, when he pays it off, to have it assigned to a trustee, in order that the money may not be merged, but may remain a subsisting incumbrance upon the land, and be a part of his personal estate. In such a case, after reciting the deed or will by which the legacy or sum is charged, it may be assigned to a trustee for the owner of the estate, "In trust for the owner, his executors, administrators and assigns, To the intent that the same may be preserved and kept on foot as a subsisting incumbrance on the lands and tenements charged with the payment thereof."

Persons having only particular estates, and paying off incumbrances, should take assignments of them.

Tenants for life, or in tail, or other persons having limited interests in lands, ought to take assignments in this way of such incumbrances as are paid off by them; as in that case their personal representatives would stand in the place of the incumbrancers, and be entitled to receive the amount from the persons subsequently entitled to the lands.

Legacies may be assigned by way of mortgage.

Legacies, and other sums of money, payable out of real or personal estate, may be assigned by way of mortgage, either with a proviso that, on repayment of the loan, the legacy or sum shall be re-assigned, or In trust that the assignee shall receive the same, and, after deducting and retaining thereout his principal and interest, In trust to pay the surplus to the assignor: the latter is the preferable mode, as in that case the assignor's release is not necessary.

Celles que trust of money to arise from sale

If by deed or will lands are conveyed or devised to trustees In trust to be sold, the persons entitled to the

money may sell or may assign their shares by way of mortgage as money or personal estate; but parties who have the sole interest in the money to arise by the sale of lands, may elect to have their shares considered as land or real estate, and may convey them accordingly, but the election should be apparent and upon the face of the deed or instrument.

CHAP. VIII.  
SEC. IV.

of lands, may  
assign their  
shares.

It is laid down in Sir Edward Sugden's treatise on the "Law of Vendors and Purchasers," that "a purchaser of an equitable right, of which an immediate possession cannot be obtained, should, previous to completing his contract, inquire of the trustees in whom the property is vested, whether it is liable to any incumbrances; if the trustee make a false representation, equity would compel him to make good the loss sustained by the purchaser. When the contract is completed, the purchaser should give notice of the sale to the trustee; the notice would certainly affect the conscience of the trustee, so as to make him liable in equity, should he convey the legal estate to any subsequent purchaser; and it would also, perhaps, give the purchaser a priority over any former incumbrancer who had neglected the same precaution." (1) Conformably to the concluding observation, it has been very recently held in two cases (2), that "a person having a beneficial interest in a sum of money, invested in the names of trustees, assigns it for a valuable consideration to A, but no notice of the assignment is given to the trustees; afterwards, the same person proposes to sell his interest to B, and B hav-

Precautions to  
be observed by  
a person pur-  
chasing an  
equitable inte-  
rest.

(1) Sug. Vend. & Pur. p. 14, (ed. 1824.)

(2) Dearle v. Hall, and Loveridge v. Cooper, 3 Russ. 1.

CHAP. VIII.  
SEC. IV.

“ing made inquiry of the trustees as to the nature of  
“the vendor’s title, and the amount of his interest, and  
“receiving no intimation of the existence of any prior  
“incumbrance, completes his purchase, and gives the  
“trustees notice. *B* has a better equity than *A* to the  
“possession of the fund, and the assignment to *B*,  
“though posterior in date, is to be preferred to the as-  
“signment to *A*,—and it is of no importance to the  
“question, whether the interest of the vendor be vested  
“or contingent, present or reversionary.”

Although the decree in these cases did nothing more  
than follow what has long been the general understand-  
ing of the profession, and adopt rule which has been  
long sanctioned by the practice of the most able con-  
veyancers, yet the general doctrine is of so much im-  
portance, and is so ably elucidated by the then M. R.,  
Sir Thomas Plumer, that they may very properly con-  
clude the observations that have been made on the  
assignment of *choses in action*. “The ground of this  
“claim is priority of time. They rely upon the known  
“maxim, borrowed from the civil law, which in many  
“cases regulates equities—‘*qui prior est in tempore*,  
“‘*potior est in jure*.’ If, by the first contract, all the  
“thing is given, there remains nothing to be the subject  
“of the second contract, and priority must decide. But  
“it cannot be contended that priority in time must de-  
“cide, where the legal estate is outstanding. For the  
“maxim, as an equitable rule, admits of exception, and  
“gives way, when the question does not lie between  
“bare and equal equities. If there appears to be, in  
“respect of any circumstance independent of priority of  
“time, a better title in the *puisne* purchaser to call for  
“the legal estate, than in the purchaser who precedes

Where the  
legal estate is  
outstanding,  
priority of time  
does not alone  
decide.



“ him in date, the case ceases to be a balance of equal  
“ equities, and the preference, which priority of date  
“ might otherwise have given, is done away with and  
“ counteracted. The question here is,—not which as-  
“ signment is first in date,—but whether there is not, on  
“ the part of Hall, a better title to call for the legal estate  
“ than Dearle or Sherring can set up? or rather, the  
“ question is, Shall these plaintiffs now have equitable  
“ relief to the injury of Hall?

“ What title have they shown to call on a court of  
“ justice to interpose on their behalf, in order to obviate  
“ the consequences of their own misconduct? All that  
“ has happened is owing to their negligence (a negli-  
“ gence not accounted for) in forbearing to do what they  
“ ought to have done, what would have been attended  
“ with no difficulty, and what would have effectually  
“ prevented all the mischief which has followed. Is a  
“ plaintiff to be heard in a court of equity, who asks its  
“ interposition in his behoof, to indemnify him against  
“ the effects of his own negligence at the expense of  
“ another who has used all due diligence, and who, if  
“ he is to suffer loss, will suffer it by reason of the neg-  
“ ligence of the very person who prays relief against  
“ him? The question here is not, as in *Evans v. Bick-*  
“ *nell*, whether a court of equity is to deprive the plain-  
“ tiffs of any right—whether the court is to take from  
“ them, for instance, a legal estate, or to impose any  
“ charge upon them; but simply, whether they are en-  
“ titled to relief against their own negligence. They did  
“ not perfect their securities; a third party has inno-  
“ cently advanced his money, and has perfected his  
“ security as far as the nature of the subject permitted  
“ him: is this court to interfere to postpone him to them?

CHAP. VIII.  
SEC. IV.

Notice to the trustee not necessary, if the purchaser of an equitable interest mean to rely on his contract with the individual.

“ They say, that they were not bound to give notice to the trustees, for that notice does not form part of the necessary conveyance of an equitable interest. I admit, that, if you mean to rely on contract with the individual, you do not need to give notice ; from the moment of the contract, he, with whom you are dealing, is personally bound. But if you mean to go further, and to make your right attach upon the thing which is the subject of the contract, it is necessary to give notice ; and, unless notice is given, you do not do that which is essential in all cases of transfer of personal property. The law of England has always been, that personal property passes by delivery of possession ; and it is possession which determines the apparent ownership. If, therefore, an individual, who in the way of purchase or mortgage contracts with another for the transfer of his interest, does not divest the vendor or mortgagor of possession, but permits him to remain the ostensible owner as before, he must take the consequences which may ensue from such a mode of dealing. That doctrine was explained in *Ryall v. Rowles* (1), before Lord Hardwicke and three of the Judges. If you, having the right of possession, do not exercise that right, but leave another in actual possession, you enable that person to gain a false and delusive credit, and put it in his power to obtain money from innocent parties on the hypothesis of his being the owner of that which in fact belongs to you. The principle has been long recognised, even in courts of law. In *Twyne's case* (2), one of the badges of fraud was, that the possession had remained

(1) 1 Ves. sen. 348. 1 Atk. 165.

(2) 3 Rep. 80.

“ in the vendor. Possession must follow right; and if  
 “ you, who have the right, do not take possession, you  
 “ do not follow up the title, and are responsible for  
 “ the consequences.

“ ‘When a man,’ says Lord Bacon (1), ‘is author and  
 “ mover to another to commit an unlawful act, then  
 “ he shall not excuse himself by circumstances not  
 “ pursued.’

“ It is true that a chose in action does not admit of  
 “ tangible actual possession, and that neither Zachariah  
 “ Brown, nor any person claiming under him, were en-  
 “ titled to possess themselves of the fund which yielded  
 “ the £93 a year. But in *Ryall v. Rowles*, the Judges  
 “ held, that, in the case of a chose in action, you must  
 “ do every thing towards having possession which the  
 “ subject admits: you must do that which is tantamount  
 “ to obtaining possession, by placing every person, who  
 “ has an equitable or legal interest in the matter, under  
 “ an obligation to treat it as your property. For this  
 “ purpose, you must give notice to the legal holder of  
 “ the fund; in the case of a debt, for instance, notice to  
 “ the debtor is, for many purposes, tantamount to pos-  
 “ session. If you omit to give that notice, you are guilty  
 “ of the same degree and species of neglect as he who  
 “ leaves a personal chattel, to which he has acquired a  
 “ title, in the actual possession, and under the absolute  
 “ control, of another person.

In case of a  
 debt, notice to  
 the debtor is,  
 in many cases,  
 tantamount to  
 possession.

“ Is there the least doubt, that, if Zachariah Brown  
 “ had been a trader, all that was done by Dearle and  
 “ Sherring would not have been in the least effectual  
 “ against his assignees; but that, according to the doc-

(1) *Maxims of the Law*, max. 16.

CHAP. VIII.  
SEC. IV.

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“trine of *Ryall v. Rowles*, his assignees would have taken the fund, because there was no notice to those in whom the legal interest was vested? In that case it was the opinion of all the Judges, that he who contracts for a chose in action, and does not follow up his title by notice, gives personal credit to the individual with whom he deals. Notice, then, is necessary to perfect the title,—to give a complete right *in rem*, and and not merely a right as against him who conveys his interest. If you are willing to trust the personal credit of a man, and are satisfied that he will make no improper use of the possession in which you allow him to remain, notice is not necessary; for against him the title is perfect without notice. But if he, availing himself of the possession as a means of obtaining credit, induces third persons to purchase from him as the actual owner, and they part with their money before your pocket-conveyance is notified to them, you must be postponed. In being postponed, your security is not invalidated: you had priority, but that priority has not been followed up; and you have permitted another to acquire a better title to the legal possession. What was done by *Dearle and Sherring* did not exhaust the thing (to borrow the principle of the civil law), but left it still open to traffic. These are the principles on which I think it to be very old law, that possession, or what is tantamount to possession, is the criterion of perfect title to personal chattels, and that he, who does not obtain such possession, must take his chance.”

“Lord Chief Justice Parker expresses himself thus (1):

(1) 1 Ves. 367. This passage of the judgment of the Lord Chief Baron is given by Atkyns (1 Atk. 177.) in the following words:—“If a

“ ‘It is said, there can be only an equitable assignment  
 “ ‘of a chose in action, which is true; and yet, in case of  
 “ ‘bonds assigned, (for bills of exchange, or promissory-  
 “ ‘notes, are assignable at law,) they must be delivered;  
 “ ‘and such delivery of the bond, on notice of assignment,  
 “ ‘will be equivalent to the delivery of the goods; for the  
 “ ‘debtor cannot afterwards justify payment to the as-  
 “ ‘signor, Domat. lib. 1. This clause extends to things  
 “ ‘in action; and all has not been done to divest the  
 “ ‘right from the bankrupt, and to vest a right in the  
 “ ‘mortgagee, for no notice appears to be given.’ So  
 “ ‘Lord Chief Justice Lee spoke ‘of an honest creditor  
 “ ‘or mortgagee,’ who has had a conveyance made to  
 “ ‘him for valuable consideration, but ‘is not to have  
 “ ‘any preference to another creditor, because he does not  
 “ ‘give notice to other creditors, by having that delivery  
 “ ‘to him to which he was entitled.’ (1)

CHAP. VIII.  
 SEC. IV.

“ ‘I cite these authorities to shew that, in assignments  
 “ ‘of choses in action, notice to the legal holder has al-  
 “ ‘ways been deemed necessary; and it would be very  
 “ ‘dangerous for the solicitor of the purchaser to neglect  
 “ ‘it. A solicitor, who should neglect it, would find it

On the assign-  
 ment of choses  
 in action, no-  
 tice to the  
 legal holder is  
 always neces-  
 sary on the  
 part of the as-  
 signee

“ ‘bond is assigned, the bond must be delivered, and notice must be given  
 “ ‘to the debtor; but, in assignments of book-debts, notice alone is suffi-  
 “ ‘cient, because there can be no delivery; and such acts as are equal to a  
 “ ‘delivery of goods which are capable of delivery. Domat. l. i. t. 2. s. 2.  
 “ ‘par. 9. says, ‘Things incorporeal, such as debts, cannot properly be de-  
 “ ‘livered.’ This is to shew the nature of assignment of debts by notice to  
 “ ‘the debtor. This clause, therefore, extends to things in action; and all  
 “ ‘has not been done that might have been done by the assignees to vest  
 “ ‘the right of them in himself, and to take away from the bankrupt the  
 “ ‘power and disposition of them, for no notice has been given to the  
 “ ‘debtors.”

(1) 1 Ves. sen. 369.

CHAP. VIII.  
SEC. IV.

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“ difficult to make out, that he had not become responsible to his client.”

“ What opportunities of fraud would be afforded, if a party, who, having obtained an equitable conveyance, conceals it from every body, and lies by for years, while intermediate transactions are taking place, could at any time come forward with his secret deed, and say to a subsequent purchaser, who had advanced his money in ignorance of the existence of such a claim, ‘ My deed is in date prior to yours ; and, therefore, whatever may have been my negligence, or your diligence, the property belongs to me ? ’ Good sense, reason, authority, and equity are all on the other side.

“ The bill, therefore, must be dismissed, but, as against Hall, without costs. I do not make the plaintiffs pay costs to Hall, because they may have been losers without any intention to commit a fraud, and I am unwilling to add to their loss. Constructive fraud is the utmost that can be imputed to them.”

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## CHAPTER IX.

### OF DEEDS OF PARTITION.

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1. *Of partition by simple conveyance among the parties.*
  2. *Of partition by bill in equity.*
  3. *Of partition by act of parliament.*
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#### SECTION I.

*Of partition by simple conveyance among the parties.*

Parceners and joint-tenants are compellable to make partition by a writ of partition, or a decree in Chancery. Modes of effecting a partition. Partition may also be enforced by Act of Parliament; or, lastly, partition may be effected by a simple conveyance, on the agreement of the parties, where they are all free from disabilities, and able to join in the conveyance.

If the parties agree among themselves as to the shares to be held by each in severalty, they, and all persons interested in the lands, may convey to a trustee as to such a part, To the use of one of the parties in fee; and, as to such a part, To the use of another of the parties, &c., with covenants with each other for peaceable possession, free from incumbrances, and for further assurance. Care should be taken that all necessary agreements as to walls, buildings, fences, ways, &c., and as to the custody of the title-deeds, be inserted; and if

CHAP. IX.  
SEC. I.

there be any fee-farm-rents or annual sums payable out of the entire estate, they must be apportioned. If there be any terms of years attendant on the inheritance, these must be assigned to trustees for the different parties. If the share of any of the parties be in mortgage, the mortgagee must join in the conveyance to confirm the partition, and the specific share of the mortgagor may, by the partition deed, be limited to the mortgagee for a term, or in fee, subject to the usual proviso for redemption, with trusts for sale, &c., if there be such in the original mortgage-deed.

Means of partitioning copyholds.

Partition may be made of copyhold lands, by surrendering the whole to trustees (if there be, for example, two undivided shares) as to so much, In trust for one of the parties, or upon such trusts as he shall declare by deed or will; And, as to the residue, In trust for the other party in the same way;—or a separate surrender of each share may be made.

Partition under a decree.

On a partition under a decree in Chancery, commissioners are appointed to divide the estate into so many lots as there are parties, and to allot the same to them in severalty, and a deed is generally prepared to the approbation of the master, for the parties to execute, and to confirm the division.

Partition by commissioners.

If a division is not made under the authority of the court, and the parties cannot agree upon the lots, they may convey to three commissioners, or trustees, In trust by such a day to make a partition, and for that purpose to make, or cause to be made, a survey or valuation of the premises, and to divide the same into (say) two equal parts, or lots,—the lots to be written in two schedules, and signed by the trustees, and inclosed, say, in two balls of equal size, to be put into a bag, and



drawn out by an indifferent person, the schedule in the ball first drawn to be certified by the commissioners as the lot of one of the parties, and the schedule in the other ball as the lot of the other party, and the commissioners must convey the same accordingly.

CHAP. IX.  
SEC. I.

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If there be incumbrances affecting the entire estate, a term should be limited, of the specific share of each party after the partition is made, for raising and paying a proportionate share of the incumbrances, and for indemnifying the other shares therefrom.

Where there  
are incumbran-  
ces.

In all cases where an undivided share of lands is to be settled on marriage, it should be vested in the trustees in fee, In trust to make a partition between them and the person or persons entitled to the other share or shares ; and it must be directed, in the settlement, that the part of the lands which, on a division, shall fall to the lot or share of the trustees, and the undivided moiety of the lands until a partition be made, shall be held and enjoyed by, and conveyed to, the trustees upon such and such trusts ; for if an undivided moiety of the freehold lands be in settlement, without this provision, a partition cannot perhaps be made for several years afterwards, except by a decree, which will bind the parties, and also the children as they come of age, or by an Act of Parliament. This power should also enable the trustees to raise gross or annual sums of money for the purpose of effecting the partition.

Settlement of  
an undivided  
share.

When the deed of partition is not delivered to each of the parties interested, it should be enrolled. Where the of title is in any respect intricate, there should be a fine, and also a feoffment,—if the slightest defect should appear in the derivation of the title to any of the shares.

The title-deeds should be deposited in the hands of a

Custody of the  
title-deeds.

CHAP. IX.  
SEC. II.

third person, with a covenant or agreement for the production of them.

Attested copy  
should be  
given to each  
of the parties.

An attested copy of the partition-deed should also be delivered to each of the parties, with a very full abstract of the title-deeds; and, at the foot of the abstract, the professional gentlemen employed, in the business, should attest, that they had compared the abstract with the title-deeds.

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## SECTION II.

### *Partition by bill in equity.*

Partition at  
common law.

Although parties may proceed at common law by writ of partition, yet where the titles of the parties are at all complicated, it is extremely difficult to proceed in a court of common law, and where the tenants in possession are seised of particular estates only, the persons in remainder cannot be bound by the judgment in a writ of partition,—the consequence is, that courts of law are rarely resorted to for the partition of estates.

The mode of proceeding in equity is by filing a bill, praying for a partition of the estate, upon which it is usual for the court to issue a commission for that purpose to certain persons, who proceed to divide the estate, and make their return to the court. If this return be not objected to by any of the parties, the court will direct the performance of the partition, and order the parties to execute proper conveyances to each other of the shares allotted to them.

An infant may file a bill of partition, or such a bill may be filed against him, and, in the former case, as it seems, (unless under very extraordinary circumstances,) is as much bound, and as little privileged, as a person of full age, though the court will take care that he does not make any injurious submissions, and will, when the cause is brought on, allow him to amend his bill on paying the costs of the day. No decree can however be made against him, without a day being allowed him, after he comes of age, to shew cause against the decree; and he is always, within six months after coming of age, served with a *subpœna* to shew cause, why the decree should not be made absolute; and if no cause be shown, or the cause shewn should not be allowed, the decree may be the next ended to compel mutual conveyances.

CHAP. IX.  
SEC. III.

Partition by  
decree in the  
case of an in-  
fant.

### SECTION III.

#### *Of partition by act of parliament.*

So many, however, are the difficulties of obtaining partition, even by bill in equity, that if it be desirable to gain the legal estate immediately, it is often necessary to resort to Parliament for a private act; as, for instance, where there are infants interested who would be entitled to shew cause against the partition, even at the distance of many years. Or if the estate be so circumstanced, that partition cannot be obtained either at law or in equity, as if the parties interested be lunatics,—or the surviving trustee (or his heir) of a settlement, with all the requisite powers for completing a partition, be a lunatic,—or the

Partition by  
Act of Parlia-  
ment.

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CHAP. IX.  
SEC. III.

trustees of an estate in strict settlement, have no power to make a partition, and the parties interested be infants, or only tenants for life, with contingent remainders to persons not ascertained, or not in being,—or the trustees have a power to make a partition, but have no authority to apply the money *received* for equality of partition,—or to raise the money to be paid for equality of partition,—or if there be a power to make partition, with a power to raise the money to be paid for equality of partition, by sale or mortgage of part of the lands in settlement, but the money could be raised, with greater ease and benefit to the parties interested and the remainder-men by a sale of timber, but the tenant for life in possession is restricted from cutting more than a certain quantity annually, or the tenant for life in such a case is subject to impeachment for waste. And so in a variety of other cases in which the intricacy of our system of settlements renders it impossible fully to accomplish the objects which the wants of families render necessary or expedient. Even in many cases, where the objects could be effected by bill, yet it would be clogged with so many inconveniences and impediments, that it is better at once to incur the expense of getting a private act.

The private act operates as a conveyance, and transfers an immediate legal estate to the trustees appointed to make the partition,—or immediately to the parties themselves, (if the property which each is to take has been previously fixed), without any conveyance from the trustees.

## CHAPTER X.

### OF DEEDS TO LEAD THE USES OF FINES AND RECOVERIES.

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1. *Of the tenant to the præcipe.*
  2. *Of the recitals.*
  3. *Of the declaration of trusts.*
  4. *Operation of recoveries and fines.*
- 

#### SECTION I.

##### *Of the tenant to the præcipe.*

If a wife be tenant for life, or tenant in tail, the husband alone may make a tenant to the *præcipe*, and no fine is necessary, the freehold being in him. Tenant to the præcipe.

It sometimes happens that lands are conveyed to a tenant to the *præcipe* for suffering a recovery, which is postponed by some accident, and, some years afterwards, the same lands are conveyed to another tenant to the *præcipe*, and the recovery is suffered. The recovery, in such a case, would be defective, because the second tenant to the *præcipe* would not have the freehold vested in him, it remaining in the person first intended to be the tenant. If, therefore, a second conveyance be necessary, it should be made to the same person, as in

CHAP. X.  
SEC. I.

the first instance; or, if he be dead, to his heirs; or such first grantee, or his heir, should join in the conveyance to the new tenant to the *præcipe*.

Tenant to  
freehold, how  
made.

It is usual to make the tenancy to the freehold by bargain and sale enrolled, and, sometimes, by bargain and sale, and lease and release. It is convenient to have a bargain and sale; and this is the general practice when the estate is intended to be sold, and there is a probability of such sale. When there is a bargain and sale, the whole title under the recovery is on record, and this obviates the necessity of taking copies of the recovery deed, a measure at this day of great importance and deserving serious attention.

Recitals.

Where the eldest son, tenant in tail under a will or settlement, suffers a recovery to bar the estate tail, and vests the fee in himself, no recitals are necessary. The parcels may be conveyed by the same description as in the settlement creating the entail, or, if no settlement, as in the most modern title-deeds; but to guard against omission, there should always be a sweeping description, after the general words, "Together, &c," in some such terms as the following:—"And all other the freehold messuages, &c., of the [*grantor*], or whereof, or wherein, he or any person or persons, In trust for him, is, or are seised of any estate of inheritance, situate, being or arising, or to be had, received or taken, in, or within the several towns, townships, &c., of &c., (enumerating them over again) or any of them." If there be any tithes, whether issuing out of the lands conveyed, or out of other lands, they should be noticed, inasmuch as tithes will pass in a deed by general words, but not in a fine or recovery, without being mentioned.

## SECTION II.

CHAP. X.  
SEC. II.*Of the recitals.*

Recovery deeds should always shew the creation of the estate tail, and the right of suffering the recovery, by stating the determination of all prior estates of freehold.

If a recovery is to be suffered of an advowson, (for Recovery of an advowson. which, as being an incorporeal hereditament, a *præcipe* will not lie) it is necessary to insert some land in the deed, whether there be any or not.

When a recovery is to be suffered for re-selling the family estate on an agreement between the father, tenant for life, and the son, tenant in tail, the former settlement must be recited, and the father alone may, by lease and release, or bargain and sale, or both, convey to the tenant to the *præcipe, habendum* for and during their joint natural lives, &c., To the intent, &c., in the usual form, after which must follow the limitation of the uses. If the original estate for the life of the father, the mother's jointure annuity, and the term for raising younger childrens' portions, are to remain unaltered, the recovery may be declared in the first place, for corroborating and confirming "the several uses and estates, in "and by the settlement, limited, created and declared, "precedent to, or before, the limitation to the first son of "the said [*the father*], and the heirs of his body, and for "corroborating and confirming the several powers and "privileges to the same precedent uses, estates, terms of "years and charges, and every or any of them, belonging "or annexed, and from and after the determination of "the said precedent uses, &c," then to the son in fee, or, "To such uses as the father and son shall jointly appoint,

CHAP. X.  
SEC. III.

“ remainder to the use, intent and purpose that the  
“ mother may have a rent-charge in addition to her join-  
“ ture with powers of distress and entry, and a term limi-  
“ ted to a trustee for better securing the same, remainder  
“ to the son in fee, or in such other manner as may be  
“ agreed upon.”

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### SECTION III.

#### *Of the declaration of the trust in a new settlement.*

Declaration of  
the trusts in a  
new settlement.

The trusts must be declared concerning the new created term, with a proviso for the *cesser* when they are all performed, or become unnecessary, or incapable of taking effect. If the father is to have a sum of money out of the estate as a recompence for buildings and improvements made by him, a power must be given to him to charge and borrow it at interest, (over and above any sum which he may have a power to charge by the old settlement), and, for securing the repayment thereof, to make any grant or demise by way of mortgage with a proviso to cease on payment of the money. The father should covenant to keep down the interest, during his life, of all sums of money which he has power to charge or borrow during his life. If there be not a leasing power in the old settlement, one should be inserted in the recovery deed. And, in order to protect the father's life estate from the judgments and incumbrances of the son (which, by the recovery, would be let in upon the new fee acquired under it) it is proper to insert a proviso, “ that if the tenant in tail  
“ shall not pay to his father, the tenant for life, a large  
“ sum of money on a day mentioned in the deed, which



“ must be *subsequent* to the suffering of the recovery, then  
 “ the grant and conveyance made by the tenant for life,  
 “ *but not the uses or purposes, upon or for which the reco-*  
 “ *very is to enure*, shall be void, and that it shall be lawful  
 “ for the tenant for life, to enter as in his former estate.”

CHAP. X.  
 SEC. IV.

Under this proviso, the conveyance to the tenant to the *præcipe*, becomes conditional, and, on non-payment of the money, the estate of the father returns to him unaffected by the acts of his son ; yet, as there was a good tenant to the *præcipe*, at the time when the recovery was suffered, the uses will stand, though the grant or conveyance to the tenant to the *præcipe* becomes void.

The same purpose may perhaps be accomplished by the tenant for life making a demise to a trustee of his life-estate for a term of years, if he so long live, in trust for himself, but the former is the preferable mode.

#### SECTION IV.

##### *Of the operation of fines and recoveries.*

Tenant in tail, with the immediate reversion in fee in himself, by levying a fine, *come ceo* &c., converts his estate tail into a base or determinable fee, which will merge (though an estate tail will not, being protected by the statute *de donis*) in the immediate reversion in fee, and thus the estate tail will be destroyed.

Effect of a fine  
by tenant in  
tail.

But if the reversion in fee so vested in the tenant in tail, happens to be subject to the debts, judgments or mortgages, or other incumbrances of his father, or of the person from whom he took it by descent or otherwise, the fine, by bringing the reversion into possession, will let in these incumbrances.

CHAP. X.  
SEC. IV.

Operation of  
equitable reco-  
very.

If the estate tail be an equitable one, (that is where the fee is in trustees or mortgagees) all *the subsequent limitations are equitable also*. The recovery of the tenant in tail will bar all the remainders and reversions, though there be no *legal* tenant to the *præcipe*; but a legal remainder cannot be barred by an equitable recovery.

After an equitable tenant in tail has suffered a recovery, he is entitled to call upon the trustees of the legal estate (provided there are no existing or unsatisfied trusts) for a conveyance of it to him.

In order to bar the issue of tenant in tail by a fine, it is not necessary that he should be in possession of the estate; so that where there is a number of tenants in tail inheritable one after another, and the tenant for life refuses to convey to a tenant to the *præcipe* for suffering a recovery, they may join in levying a fine *sur concessit* for a term of years, or a fine *come ceo &c. de droit tantum* to a mortgagee or purchaser, which will convey an estate that will have continuance, so long as the tenants in tail, or any of them, or any of their issue inheritable to the entail, are in existence, and they may covenant, that on the death of the tenant for life, the first person entitled in tail, shall suffer a common recovery to establish the demise or conveyance in fee.

A fine *sur concessit*, for a term of years, is preferable, not only because a doubt has arisen, whether the issue of a tenant in tail who has levied a fine, can, after his death, bar the estate tail and remainders over by a recovery, but also if a fine *come ceo &c.* be levied, the conuzee or his heir (who may happen to be an infant, or out of the kingdom,) must join in conveying to the tenant to the *præcipe*; but if a term be created, the in-

heritance still remains vested in the tenant in tail, who, if living, or his issue, if he be dead, may, with the concurrence of the conuzee in a fine *sur concessit*, make a tenant to the *præcipe* and bar the estate tail and remainders.

CHAP. XI.  
SEC. IV.

If a married woman be entitled to an annuity, issuing or directed to be raised out of lands, she may extinguish the same by levying, along with her husband, a fine of those lands. If she is entitled to the interest, payable to herself, exclusive of her husband, of a sum of money charged on lands, it may also be extinguished by a fine of the lands.

Extinguishment of an annuity, &c. by a married woman, how to be effected.

If a married woman be vouched in a common recovery, it will extinguish her dower, her powers of appointment and any other right, interest, sum of money, or incumbrance she may be entitled to, out of the lands entailed, and will have, as to her, precisely the same effect as a fine, she being bound in one case as well as the other by the judgment of the court ; but if the estate be limited back to the husband in fee, dower will attach upon this estate.

If a term of years be subsisting, the trusts of which are satisfied, but the term cannot be got in, it may be barred by a fine, expressly levied for that purpose ; but then there must be a representative of the term in being, and free from disability at the time when the fine is levied. If the term were vested in a person who died intestate, and there were no administrator at the time when the fine is levied, it will be no bar ; but if there were an administrator at the time, who died afterwards, and no other administration taken out before the end of the five years, as the time has once begun to run, the non-claim will, at the end of that period, be complete.

Term may be extinguished by a fine.

CHAP. X.  
SEC. IV.

Misdescription  
of the parts in  
a recovery.

A term assigned to a trustee by a person who is seised of the inheritance, is not barred by the fine.

If part of the lands intended to be comprised in a recovery, be omitted by mistake, and the description in the deed will authorize it, the recoveror has a right to make his election, and to ascertain the particular parts of the premises upon which the recovery shall have effect: this may be done to answer any temporary purpose, but a new recovery should be afterwards suffered.

Recoveries and fines, where the parcels are insufficient, may be amended on motion, provided the description in the deeds to lead or declare the uses are sufficiently comprehensive.

Effect of a  
conveyance by  
tenant in tail.

A conveyance by tenant in tail, without fine or recovery, passes an estate for his life only, determinable by his issue in tail; but inasmuch as such estate amounts to a freehold, if the tenant in tail afterwards wants to suffer a recovery, the grantee, in such conveyance, must join in making the tenant to the *præcipe*, or otherwise the recovery would be void, as the tenant in tail had not the freehold in him at the time the recovery was suffered. Whenever, therefore, tenant in tail in remainder, expectant on an estate of freehold, wants to make a security for money, the right way is to demise for a term of years, and levy a fine *sur concessit* to confirm the term, which will have continuance so long as the tenant in tail, or any of his issue inheritable to the estate tail, are in existence; and, as the possession of the termor is always considered as the possession of the reversioner, the tenant in tail may, on the death of the person who had the preceding estate of freehold, suffer a recovery in the same manner as if he had never granted the term; And, forasmuch, as the

recovery of a tenant in tail lets in all estates, charges and incumbrances, created by him, the term will thereby be established; though, in such a case, if it be the intention to keep the term on foot, it would be proper to confirm it in express words by the recovery deed.

CHAP. X.  
SEC. IV.

There is no occasion to vouch the tenant for life. However it is prudent to do this when the tenant for life is the person to whom the settlement is made, or heir of the family. By joining the tenant for life in the voucher, old dormant entails may be barred. Voucher, who should join in.

When a married woman, who is tenant for life, is to convey an estate, and a recovery is necessary to complete the title, she and her husband should join in the voucher, that she may effectually pass the estate for life. For though strictly speaking there is no necessity that the tenant for life should be vouched, it is advisable; as by their concurrence appearing on the record of the recovery, it will be presumed that there was a good tenant to the *præcipe*, though the deed making the tenant should be lost.

Where lands have been in the family a long time, and the parents are tenants for life, and a child tenant in tail, it is adviseable to have a recovery with treble voucher, that the son may vouch the parents. By these means all dormant titles, if there are such, will be barred. A common recovery, with treble voucher, is also the proper assurance, when tenant in tail creates an entail; in that case, the new tenant in tail should be vouched, and vouch the old tenant in tail. In what cases treble voucher may be proper.

Suppose an estate to be limited to the first and other sons of a marriage, and doubts are entertained whether the eldest is not a bastard, it will be proper, if practicable, that the first and other sons should be vouched.

CHAP. X.  
SEC. IV.

It seems, however, to have been doubted by the most eminent conveyancers, whether there was any case in which a recovery with treble voucher was necessary, and it has been suggested by men very capable of forming a correct opinion, that two tenants in tail might be vouched jointly.

There being no evidence of a family settlement a recovery should be suffered.

Where the title to an estate depends on descent from father to son, through several successive generations, and no settlement appears to have been made on the marriage of the several ancestors, it is most advisable that a recovery should be suffered, for the purpose of barring any latent entails; and, under these circumstances it will be right, in the deed making the tenant to the freehold, to recite the fact, or state the reason for suffering a recovery. This recital will remove the presumption of an existing entail under a settlement, in the remembrance or knowledge of the parties, and supersede the necessity of inquiring, on the part of the purchaser, after settlements, any further than such inquiry would have been deemed necessary if no recovery had been suffered.

The present owner is to suffer a recovery on the ground that if there be any entail, under a settlement, by his ancestors on their marriage, he must at least be tenant in tail under that settlement, upon the well known ground, that limitations to the children of a person yet unborn, are too remote and void when an estate is limited to that person.

When a tenant in tail becomes entitled to the remainder or reversion in fee, by descent, a recovery is a mode of assurance always preferable to a fine.



## CHAPTER XI.

### PARTNERSHIP ARTICLES.

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Though for the encouragement of husbandry and trade, stock on a farm occupied jointly, and also such used in a joint-undertaking, are considered as common and not as joint-property, and there shall be no survivorship therein (1), yet some agreement is necessary between the partners to ascertain the term of the partnership, their proportions of the capital employed, &c. Persons, therefore, who enter into partnership, should execute a deed to define the term for which the connexion is to subsist,—the amount of, and their respective shares in, the capital,—their shares of profits,—the firm, and the place where the business is to be carried on,—with a variety of other matters to be found in all well-drawn articles of partnership.

The period of partnership should be defined.

As the trade may be of such a nature as to sustain the greatest injury if it should be interrupted and suspended, for ever so short a period, by the death of any of the partners, it is usual, in most cases, to provide that, in such an event, the surviving partners shall take

Death of partner.

(1) See in the margin 1 Vern. 217 ; Co. Litt. 182.

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CHAP. XI.

the whole stock, debts and effects, and shall pay to the representative of the deceased partner, in case he shall die before a general annual account shall have been settled, and before the day fixed upon for taking it shall have arrived, the sum which the deceased partner brought into the concern, with interest from the commencement of the partnership, and a certain allowance besides (suppose at the rate of £100 for three months, which is equal to five *per cent.* upon a capital of £8000, but it must not be called interest, lest the contract should appear usurious), in lieu of profits, the above to be secured by the bond of the surviving partners, payable, with interest, by instalments, at three, six, and nine months, or as may be agreed on ; but if a general account shall have been settled, or the time limited for taking it shall have elapsed before the deaths of any of the partners, then the representative of the deceased partner is to be entitled to a sum equal to the amount of his share of the stock and effects, upon balancing the last preceding annual account,—or to which it would have amounted if taken at the proper time,—with interest, and an allowance for profits from the settlement of the last general account to the death of the partner first dying, to be secured by instalments in the manner above-mentioned. The surviving partner should also give a bond of indemnity to the representative of the deceased partner against the debts due from the partnership, and such representative should “release and assign” (for the partnership effects, though not liable to survivorship, still so far partake of the nature of a joint-tenancy or coparceny, as to pass by *release* more properly than by *assignment*) all the right and interest of



the deceased partner in the stocks, debts and effects be- CHAP. XI.  
 longing to the partnership.

In some cases, desperate and doubtful debts are to be Doubtful debts.  
 excluded from the general annual statement, and directed  
 to be divided between the partners by lots; but, as in  
 all well regulated concerns these are valued and classed  
 at the time when they are included in the general yearly  
 account, it does not seem necessary to make any parti-  
 cular provision concerning them.

In case the term shall expire, or the partnership be dis- Dissolution of a partnership.  
 solved by notice under a power for that purpose in the  
 deed, then, after payment of the debts, the partnership  
 effects must be directed to be equally divided by lots  
 amongst the parties, according to their shares in the capi-  
 tal, each giving mutual bonds, with suréties for payment  
 of their respective shares of the partnership debts, and in-  
 demnifying the others therefrom, and each assigning and  
 enabling the others to receive the shares allotted to them  
 of the debts owing to the partnership. As it frequently  
 happens that one of the partners lends money to the  
 concern, there should be a proviso in the deed, subject-  
 ing the partnership effects with the repayment of such  
 loan with interest; and as one partner may ruin the  
 rest, by drawing bills or granting securities in the name  
 of the firm, for which no value is received, it may be  
 useful to insert a clause in the articles, giving power to  
 the other partners, immediately after any such proceed-  
 ing, by any instrument under their hands and seals, to  
 dissolve the partnership or dismiss him therefrom.

It is expedient, in many cases, but particularly useful Arbitration clause  
 in partnership articles, to bind the parties to refer their  
 disputes to the arbitration of three indifferent persons;

## CHAP. XI.

when there are two partners, and when there are more, to as many persons as there are parties concerned; where there are to be three arbitrators between two parties, each partner must choose one, and those two must associate to themselves a third, and the award of two to be conclusive. To prevent inconvenience from either of the parties refusing to nominate his arbitrator, it may be directed that, after one of them has made his nomination, and given notice thereof to the other, if he shall not name within a limited time, the first arbitrator shall name a second, and these two a third, before they proceed, and that the award of any two shall be binding. It is useful, also, to direct that the submission to the award shall be made a rule of one of the Courts at Westminster, in which case the party may be attached for refusing to perform it; which is a more expeditious method of obtaining judgment than by suing on the bond or agreement to arbitrate.

Appointment  
of a successor  
by will.

In partnership articles, it may be stipulated, that a son, or some other relation or person nominated by will, and, if no nominee, the executors or administrators of the partner dying shall succeed him in the business. In this case, deeds will be necessary to substitute and confirm him a partner, and to subject him to the performance of the partnership articles, and the losses which shall thenceforth be sustained in the business.

Real estate  
should be  
vested in trustees for the  
purposes of the  
partnership.

Houses, buildings and lands may constitute part of the joint-stock; but all real property so circumstanced should be vested in trustees for the purposes of the partnership, or in the partners as joint-tenants, subject to the agreement in the partnership articles for a division, &c. at the end of the partnership; otherwise the

heir or devisee of any one of the partners might, on coming into possession, interrupt the business of the surviving partners, or put them to great inconvenience by refusing, till compelled, to convey the share of the deceased partner to the survivor.

CHAP. XI.

The term PARTNERSHIP is usually applied to associations of a small number of persons. Where the number is considerable, they are usually called a "company," as "the East India Company." Such companies are sometimes established by act of parliament, and then of course they are governed by laws conformable to their charter. If the company be formed by the mere agreement of the parties themselves, then it is governed by the same laws as any other partnership, subject to the provisions of the deed for the settlement of the company. The deed of settlement usually provides, that the capital shall consist of a given sum, and be divided into a certain number of shares that no proprietor shall hold more than a given number,—that the affairs of the society shall be conducted by a committee of proprietors, to be chosen by the general body and called directors or managers. There are also provisions for the appointment of proper officers, and for their regulation,—for calling general or extraordinary meetings, their objects, powers, &c.,—for regulating the alienation of shares by sale or on death or bankruptcy,—with the other usual provisions for dissolving the company, &c.

Deeds for the settlement of companies.



## CHAPTER XII.

### OF RECONVEYANCES.



Reconveyance  
of freehold by a  
mortgagee to  
the mortgagor.

When the principal and interest due on a mortgage are discharged, the estate must be reconveyed to the mortgagor, if living, but, if dead, to his heir, devisee or trustee, &c. In the first case it is necessary to recite the mortgage, and, after taking notice that the principal remains due, with so much interest, to reconvey in consideration thereof, to the mortgagor in fee, with a covenant from the mortgagee, that he has done no act to incumber. If the mortgagee be dead, and the legal estate has been devised to his trustee, or descended to his heir, the will must be recited or the descent stated, and, in consideration of the mortgage-money and interest paid by the mortgagor to the executors or administrators of the mortgagee, the heir or trustees, by the direction of the executor or administrator, must convey to the mortgagor, with a covenant that no act has been done to incumber; but it is not usual for the executors or administrators, unless they are residuary legatees, to covenant against the acts of their testators.

Reconveyance  
of copyhold.

On a reconveyance of copyhold lands by surrender, the executor should be a party as well as the heir, in order to shew that the principal and interest have been

paid, for if the surrender should be from the heir alone, there is no proof upon the face of it that the principal and interest have been discharged. CHAP. XII.

A deed of covenant is proper on the reconveyance of copyhold lands, to evidence the payment of the money.

If, after the mortgage, the mortgagor have devised or conveyed the mortgaged lands to uses, or upon trusts, his will, or the conveyance, should be recited, and the lands should be reconveyed to those uses, or upon those trusts, or to, for, or upon such of the same uses as are existing, &c. Reconveyance when mortgaged lands have descended, &c.

If a termor for 999 years, make a demise for a less term, suppose 900 years, by way of mortgage, and, upon payment of the mortgage-money and interest, the lands are assigned to the mortgagor, no part of the original term will be merged, but the mortgage-term will be re-united to the reversion left in the mortgagor, though it may not be improper to add, after the *habendum*, the following, or some such words :—"And to the intent that " the said term of 900 years may no longer subsist as a " distinct term or interest, but may be reunited to, and " and constitute a part, of the said term of 999 years, " from which the same was, by the said recited indenture of demise, severed or divided." Reconveyance of a term carried out of leasehold.

When a mortgage is made of freehold land by demise, the term, on payment of the principal and interest, may be surrendered to the mortgagor, provided he hath granted no intermediate estate, either in fee or for years, to a third person, which will prevent a merger; but if the word "assign," as well as the word "surrender," be made use of, then, if the term cannot merge, it will vest in the mortgagor, and continue a distinct estate in Reconveyance of freehold on mortgage by demise.

CHAP. XII.

him, until, from an alteration of circumstances, a merger can take place.

It may be further observed that the reconveyance should contain two distinct operative parts, by the first of which the mortgagee reconveys his estate in the land to the mortgagor, and by the other he releases the mortgage-money.

The reconveyance is very generally, and perhaps ought always to be, made by indorsement, because, in the first place, this is the least expensive mode, and in the next, there is no chance of the evidence of the reconveyance being lost, as might easily happen if it were made by a separate deed.

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*RECONVEYANCE of mortgaged premises (being freehold estates) by way of INDORSEMENT, with a declaration that the mortgage-money (which was TRUST-MONEY,) should thenceforth be and remain upon the SAME TRUSTS as if it had NEVER BEEN INVESTED in mortgage.*

THIS INDENTURE, &c. between  
 the within-mentioned [*mortgagee*], of the first part,  
 \_\_\_\_\_ [*mortgagor*], of the second part,  
 \_\_\_\_\_ [*wife*], the wife of [*mortgagor*],  
 of the third part.

WHEREAS the within-mentioned principal sum of £500, and all interest thereon up to the day of the date of these presents, have been fully paid and satisfied by the said [*mortgagor*] to the said [*mortgagee*], as he the said [*mortgagee*] doth hereby admit and acknowledge:

NOW THIS INDENTURE WITNESSETH, that in consideration of the premises, and for and in consideration of the sum of ten shillings, of lawful, &c. to the said [*mortgagee*] paid, &c. (the receipt, &c.), He, the said [*mortgagee*], hath bargained, sold and released, and by, &c. unto the said

[*mortgagor*] (in his actual &c.), ALL the messuages and CHAP. XII.  
tenements, and other hereditaments comprised in the within-written indenture, and thereby released and assured, or intended so to be, with their and every of their rights, members and appurtenances, And all the estate of him the said [*mortgagee*], of, in, to, or out of the same,

TO HAVE AND TO HOLD, &c.

Unto and to the use of the said [*mortgagor*], his heirs and assigns for ever, Upon such trusts, and to and for such intents and purposes as the said hereditaments would now have been subject to if the within-written indenture, or the lease for a year on which it is grounded, had not been made and executed.

AND THIS INDENTURE ALSO WITNESSETH, that in consideration of the premises, He, the said [*mortgagee*], hath remised, released, and for ever quit-claimed, and by, &c. Unto the said [*mortgagor*], his executors, administrators and assigns, ALL the within-mentioned sum of £1,000 three *per cent.* Consolidated Bank Annuities, and all and singular the premises by the within-written indenture aforesaid, or intended so to be, To the end that the said principal sum of £1,000 three *per cent.* Consolidated Bank Annuities, and all and singular other the premises by the within-written indenture assigned or intended so to be, may henceforth remain and be

UPON SUCH TRUSTS, and to and for such intents and purposes, as the same would now have been subject to if the within-written indenture had not been made and executed. [*Short covenant by mortgagee that he has not incumbered.*]  
IN WITNESS, &c.

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## CHAPTER XIII.

### APPOINTMENT OF RECEIVER.

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Where there is a covenant in mortgage or annuity-deeds for the appointment of a receiver, it should be distinctly stated, that the receiver, though appointed by the mortgagee or annuitant, after default of the mortgagor or grantor to concur in the appointment, should be the agent of the mortgagor or grantor, thus :—“ And “ that the person or persons so appointed should be “ treated and considered as the agent of the said [*mort-* “ *gagor* or *grantor*], or his assigns, for every purpose of “ applying a competent part of the rents and profits of “ the hereditaments in satisfaction of the said annuity, “ &c.”

The following is the form of a deed for the appointment of a receiver :—

Deed for the  
appointment of  
a receiver.

AND WHEREAS upon the treaty for                      it was  
agreed that, for securing the due and regular payment  
thereof, the said                      should be appointed receiver of  
the rents and profits of the said                      and other  
hereinbefore                      as aforesaid, upon and under the  
terms, stipulations and agreements hereinafter contained:  
Now, THEREFORE, THIS INDENTURE WITNESSETH, that, in



pursuance of the said agreement, and for the considerations hereinbefore expressed, he, the said , with the approbation and concurrence of the said , testified by his executing these presents, HATH constituted and appointed, and by these presents DOTH constitute and appoint, the said receiver and agent, from time to time, in the name of him, the said , to ask, demand, collect and receive all and every the rents and profits of all and singular the said hereinbefore particularly mentioned and hereby charged and as aforesaid, of and from the present and future occupiers thereof respectively, as and when the same shall from time to time become due and payable; and, in case of the non-payment of such rents and profits, or any of them, to take and use such lawful remedies for recovering and obtaining payment thereof, or any part thereof, by action, suit, distress, or otherwise, as shall be thought necessary, and further to perform and execute all other acts, matters and things needful and requisite for the collecting and receiving the said rents and profits, as fully and effectually, to all intents and purposes, as the said could or might himself do; And the said doth hereby order and direct all and every the tenants and occupiers of the said and premises, to pay unto the said all and every the rents and profits thereof for the purposes hereinafter mentioned; And doth hereby declare, that his receipts in writing shall be good and sufficient discharges to the same tenants or occupiers for such rents and profits as they shall respectively pay to him: And it is hereby agreed and declared between and by all the parties to these presents, that the said do and shall, from time to time, pay and apply the rents and profits which he shall receive by virtue of these presents in the manner following, (that is to say,) in the first place, pay thereout all landlord's taxes, and all rates, assessments and impositions, which now are or hereafter may be taxed and rated charged, assessed, or imposed on the said and premises, or any of them, or on the owner of the same pre-

CHAP. XIII.      mises for or in respect thereof, together with the expenses of all necessary repairs thereof, which ought to be done by the landlord; and also do and shall retain and deduct to himself thereout *per cent. per annum* upon the gross rental which he shall actually receive as aforesaid, as a compensation for his time and trouble in acting as receiver as aforesaid; and, in the next place, do and shall [*state here the other trusts of his appointment*]; and, lastly, do and shall pay, or cause to be paid, unto the said , his heirs, executors or administrators, or as he or they shall order and direct, all the clear residue and surplus of the rents and profits of the said and premises, which shall from time to time remain after answering the several purposes aforesaid, or such of them as shall be in a state of actual performance, and the said , doth hereby for himself, his heirs, executors, administrators and assigns, covenant, promise and agree, with and to the said , his executors, administrators and assigns, and also with and to the said , his executors, administrators and assigns, that he, the said , shall and will, from time to time, so long as he shall continue to be the collector and receiver of the aforesaid rents and profits, truly and punctually pay, or cause to be paid, in manner, and for the intents and purposes aforesaid, all such sums and sum of money as shall be collected and received by him, under or by virtue of the aforesaid power or authority; And the said , doth hereby for himself, his heirs, executors and administrators, covenant, promise and agree, with and to the said , his executors, administrators and assigns, in manner following, (that is to say) That he, the said , shall not, nor will, without the previous consent in writing of the said , his executors, administrators or assigns, revoke the powers or authorities hereby given to the said , or to be given to any such future receiver, as hereinafter is mentioned, or any of them, or do, or suffer to be done, any act or thing to lessen, or in any manner affect the same, or impede the execution

thereof, during the continuance of the said  
 And also, that in case the said , or any future  
 receiver to be appointed as hereinafter is mentioned, shall  
 die, go to reside beyond seas, refuse, or become incap-  
 able to receive and collect the rents and profits of the said  
 , and other premises, or shall misapply the same  
 rents and profits, or any of them, or shall otherwise misbe-  
 have himself in the confidence hereby in him reposed,  
 during the continuance of , then, and in any  
 of the said cases, he, the said , shall and will  
 join with the said , his executors, administrators  
 and assigns, in removing the said , or any future  
 receiver, from his said employment, and shall and will, duly  
 constitute and appoint such other fit person in his stead as  
 the said , his executors, administrators and  
 assigns, shall, from time to time, nominate or approve, to  
 collect, receive and pay the rents and profits of the said  
 and other premises, upon and for the trusts  
 and purposes hereinbefore declared thereof, and so from  
 time to time, when and as often as the like case shall hap-  
 pen during , and in case the said  
 shall refuse or neglect so to do for the space of three ca-  
 lendar months next after the death, departure to reside be-  
 yond seas, refusal to collect, incapacity, or misbehaviour of  
 the said , or any such future receiver as afore-  
 said, then, and in such case, it shall and may be lawful, to  
 and for the said , his executors, administrators  
 or assigns, if he or they shall think fit, without the concu-  
 rrence of the said , to constitute and appoint some  
 fit person to collect, receive and pay the said rents and pro-  
 fits, upon the trusts and for the purposes aforesaid, with  
 such reasonable salary for his trouble and expense as he, the  
 said shall think proper, not exceeding in  
 the pound, upon the gross rental of the said premises, for the  
 time being; PROVIDED ALWAYS, and it is hereby agreed  
 and declared, that the said , his executors, ad-  
 ministrators and assigns, shall not, in any case, be charged  
 with or answerable for any loss, misapplication, or non-

CHAP. XIII. application of the said rents and profits, or any part thereof, by reason of any default, neglect, or breach of trust in the said                   , or any future collector or receiver to be appointed as aforesaid, but that such loss, misapplication, or non-application, and every receiver's salary, shall be wholly borne and paid by the said                   , his executors, administrators, or assigns: PROVIDED ALWAYS, and it is hereby agreed and declared, that the said                   , or any receiver so to be appointed as hereinbefore is mentioned, shall not, in any wise, exercise the powers or authorities hereinbefore contained, unless and until one half-yearly payment of the said                   shall be in arrear and unpaid by the space of thirty days or more next after the same shall become payable, any thing hereinbefore contained to the contrary notwithstanding.

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## CHAPTER XIV.

### OF ESTATE BILLS.

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A private act of parliament, which has been defined to be “an assurance of record (1),” does not, like other assurances, depend on the aid or consent of the parties themselves, but upon the authority of the high court of parliament, where it is placed upon the same footing as the records of the kingdom. Effect of a conveyance by act of parliament.

No species of private act is so involved, or requires so much skill and knowledge in the framing it, as those for the conveyance of estates. Some of the purposes for which a private act may be necessary, have been already enumerated under the head **PARTITION**. Other objects are the following:—to enable infants to suffer recoveries, or levy fines of entailed, or convey other, lands, for the purpose of making a family provision on their marriage, or for other reasonable and beneficial purposes,—to authorise guardians and committees to renew leases and apply rents, &c. in payment of fines and expenses,—to enable tenants for life, and others having only particular interests, or committees of lunatics, to make or renew leases, fell timber, or exercise other acts of ownership, which would Occasions on which private acts usually are applied for.

(1) 1 Bl. Com. 184, 2 Ib. 344.

CHAP. XIV.

be beneficial to all parties interested, but whose consent, by reason of coverture, idiocy, &c., cannot be obtained,—to empower tenants for life and remaindermen, to charge an estate with jointures, to enable them to marry suitably to their rank and family, where no parties, except such as are very remotely interested, could be prejudiced thereby,—to enable tenants for life to raise portions for their younger children, under the trusts of a term, before the period fixed by the settlement,—to enable trustees of settlements to sell or exchange settled estates, where opportunity occurs of thereby procuring others more eligibly situated,—to confirm exchanges or partitions of estates, in cases where some of the parties are incompetent to assent to the agreement of the others,—to correct mistakes or omissions in family settlements, or other deeds, by which the intention of the settlors is prevented from being carried into effect,—to enable bodies-corporate to sell, purchase or exchange lands, where beneficial to the objects of their institution, to authorise the enfranchisement of copyholds under settlement,—to dissolve a marriage in order to prevent a spurious offspring becoming entitled to settled estates, or other just cause,—to naturalize subjects bearing allegiance to a foreign power, to enable them to hold land, or for other beneficial or reasonable purposes,—to enable a person to use the name and bear the arms of another, in pursuance of the conditional provisions of a will or settlement;—in short, to remove any obstacle which may be interposed to the full and beneficial enjoyment and disposition of property, by the parties substantially and beneficially entitled thereto.

A conveyance thus made may be the act of the legisla-

ture, yet it is, nevertheless, regarded as a mere assurance, and cannot be noticed either by the court or the jury, unless specially pleaded and set forth; unless, as is now generally the case, the act contain a distinct declaration to that effect.

CHAP. XIV.

Private bills, unless some rate or payment, or penalty for breach of their provisions,—for then they become in the nature of money-bills, and must originate in the House of Commons,—may pass through their first stage in either house. Such bills, however, are very generally introduced first in the House of Lords, and more especially in the case of ESTATE BILLS, inasmuch as the petition for leave to bring in the bill must be referred to the judges, for their approval, before the bill can proceed in that house; and, therefore, it is prudent, on the score of economy, to encounter this obstruction before any expense has been incurred in preparing the bill, &c.

Estate bills generally originate in the House of Lords.

Acts of Parliament, for the transfer or settlement of real property, were formerly obtained principally at the instance of powerful individuals, and often on very slight, not to say unjust pretexts. In later times, however, much care and precaution has been practised, in reference to bills of this description, more especially in the House of Lords, where the bill is not allowed to proceed, until the petition has been referred to two of the judges, and they have reported in favour of it.

Parliament very cautious at the present day in passing estate bills.

The first step, in this proceeding, is a petition, praying for leave to bring in the bill. The petition comprises a full recital of the state of the title, so far as may be proper to shew the difficulties under which the parties labour, and the incompetency of any other court of judicature to grant relief; and there must be an averment, that no persons who

The first step is a petition for leave to bring in a bill.

## CHAP. XIV.

Must be signed  
by all inte-  
rested parties.

may hereafter become interested in the estate, under any subsisting limitations, can be prejudiced by the operation of the bill. By an order of the House of Lords, the petition must be signed by all parties who are interested in it; and this order extends to trustees for interested parties, with the exception of such only as are mere conduit pipes, as trustees to preserve contingent remainders in strict settlements. Where the consent of material parties cannot be had immediately, there is generally a clause in the bill, declaring that its operation shall be suspended till they are able to give their consent. In a recent case of this kind, one of the parties whose consent was to be had was residing abroad; he died before his consent could be obtained, and it was necessary to apply to parliament again for a second bill to amend the first.

An act cannot  
be obtained for  
the sale of  
lands under  
which there  
are mines.

By a standing order of the House of Lords, no private bill can be had for the *sale* of lands, under which there are known to be any mines. Two instances have recently come under the author's observation, in which bills were rejected on this ground, after the parties had incurred considerable expense. The proper course, in this case, is to apply for a bill to *demise* the lands for a term.

Provisions and  
precautions as  
to bills affecting  
lands settled,  
or to be pur-  
chased and set-  
tled.

It is also a standing order of the house, that where a bill is brought to empower any person to *sell* or dispose of lands in one place, and to *buy* or settle lands in another place, the committee to whom such bills shall be referred, do take care that the values be fully made out; and if the bill shall *not* be for making a *new* purchase, but *only for settling* other lands in lieu of those to be sold, in that case *provision shall be made* in the bill, that such other lands be settled accordingly. But if the bill be to *purchase and settle* other lands, in that



case the committee are to take care that there be a binding agreement produced for such new purchase; or if it shall be made appear to the committee, that such agreement cannot then be made, or that such new purchase cannot then be made and settled as desired by the bill, and the committee shall be satisfied with the reasons alleged for either of those purposes, in either of those cases *provision shall be made in the bill*, that so much of the money arising by sale of the lands directed to be sold, as is to be laid out in a new purchase, shall be paid by the purchaser or purchasers into the Bank of England, in the name and with the privity of the Accountant-General of the High Court of Chancery, to be placed to his account there, *ex parte* the purchaser or purchasers of the estate of the person or persons mentioned in the title of the said bill, pursuant to the method prescribed by the act of 12 Geo. I. c. 32, and the general orders of the said court, and without fee or reward, according to the act of 12 Geo. II. c. 24; and shall, when paid in, be laid out in the purchase of navy or victualling bills, or Exchequer bills.

It is also a standing order of the House, that in any private bill for exchanging an estate in settlement, and substituting another estate in lieu thereof, there shall be annexed to such bill a *schedule* or schedules of such respective estates, shewing the annual rent and the annual value thereof, and also the value of the timber growing thereupon.

To bills for sale or exchange of settled lands, a schedule of rents, &c. of both estates must be annexed.

And in all private bills for *selling* a settled estate, and purchasing another estate *to be settled to the same uses*, there shall be annexed to such bill a *schedule* or schedules of such estates, specifying the annual rent thereof; and every such schedule shall be signed and proved upon oath by a surveyor, or other competent

## CHAP. XIV.

person, before the committee to whom such bill shall be referred.

Powers given by the act for appointing new trustees must be exercised by the Court of Chancery.

And also, when any of the parties interested in any private bill, shall have power by such bill to name a trustee in the room of any trustee dying, resigning, or refusing to execute his trust, provision shall be made in the bill, that such new trustee shall be appointed *by or with the approbation of the Court of Chancery.*

Notice must be given to a mortgagee.

By a standing rule of the House of Lords, "it is ordered, that when a petition is presented to either house for a private bill, notice shall be given to any person being a *mortgagee* of the estate intended to be affected by the bill."

It is believed, that on an estate bill, this is the only case in which notice is necessary.

Reference of the petition to the judges.

On the reference of the petition to the judges, the various allegations of it must be proved by witnesses who have been previously sworn at the bar of the House of Lords. All deeds and written instruments affecting the property, which have been entered into within thirty years, must be proved by the personal attendance of the attesting witnesses, unless the circumstances be such as to authorize the judges in dispensing with their attendance. If an act of parliament be recited, a copy from the King's printer must be produced. The various facts of marriages, births, deaths, descents, intestacies, &c must be proved, as in ordinary cases of title.

The form of the petition, and the judge's report, will be best understood by the two following forms:—

To the Right Honourable the Lords Spiritual and Temporal, in the Imperial Parliament assembled.

The humble Petition of *A. B.* of Chelmsford, &c. and [*Mary*], his wife, formerly *O. M. A. C. A.* of the same place, spinster, and *E. B.* of &c., spinster, and *A. B.* the younger, (*E. B.* and *A. B.* the younger, being the two children of the said *A. B.* and [*Mary*], his wife, who have attained the age of twenty-one years,) and the said *A. B.* the elder, on behalf of [*infants*], being the eight other children of the said *A. B.* the elder, and [*Mary*] his wife, who are all minors under the age of twenty-one years.

Sheweth,

That by an indenture bearing date, &c. 17—, and made between *E. A.* therein described, and Ann, his wife, of the one part, and *S. A.* therein also described, of the other part. After reciting that the said *E. A.* and Ann, his wife, and *S. A.* held in common, undividedly, all the estates therein mentioned in —, in the said county of Essex, (that is to say,) the said *E. A.* and *A.* his wife, one-third by themselves, and the said *S. A.* two-third parts, It is witnessed that each covenanted for themselves, and their several heirs and assigns, that a partition of the said estates should be made between them in manner following, that is to say, first, that the said *E. A.* and *A.* his wife, should, from henceforth, have and enjoy in severalty, by themselves and their heirs, the messuages, lands and other hereditaments therein particularly described; and, secondly, that the said *S. A.* should, from thenceforth, have and enjoy in severalty, by herself and to her heirs, for her two-third parts, the cottages, lands and other hereditaments, therein also particularly described;

That by indentures of lease and release, bearing date respectively the — and — days of July, 1796, and made between the said *S. A.* of the first part, *W. M.* of the second part, and *X. Y.* of the third part, (being the settlement of the real estates of the said *S. A.* made previous to and in consideration of the marriage then intended, and which was shortly afterwards duly had and solemnized between the said

CHAP. XIV. *W. M. and S. A.*) the hereditaments and premises hereinbefore recited to have been allotted to the said *S. A.*, were, together with a manor and other hereditaments therein mentioned, conveyed and limited by the said *S. A.*, [*In strict settlement on the husband, wife and issue,—remainder as S. A. should by deed or will appoint,—remainder to her in fee,—power to trustees, with consent of husband and wife, or survivor, to sell the premises at ———, and therewith to pay off mortgages of £—— and £——, therein mentioned, and surplus-money to be settled correspondently.*]

That the marriage between the said *W. M.* and *S. A.* was duly solemnized; And that the said *S. A.*, afterwards called *S. M.*, duly made, signed and published her last will and testament, in writing, in manner required by the power or authority given her by the said hereinbefore in part recited indenture of settlement, bearing date the —— day of Jan. 17—, and thereby did [*devise her realty to trustees for five hundred years, and, subject thereto, to the petitioners, M. A. and C. A. for their respective lives, as tenants in common, with benefit of survivorship; After death of survivor, to all the children of the two per capita, as tenant in tail, with cross remainders,—remainder to heirs of the survivor of M. A. and C. A.—term declared to be in trust by mortgage to raise money to pay off the mortgages and legacies. Bequest of certain legacies,—gift of other legacies by codicil.*]

That the said *S. M.* departed this life, after the execution of her said codicil, without having revoked or altered her said will or codicil, and the same were duly proved in the proper ecclesiastical court, and that there never was any issue born of the said marriage.

That the said *W. M.* departed this life sometime in the year 1800, and that your petitioner, *M. A.*, one of the devisees named in and by the said hereinbefore in part recited will of the said testatrix, after the execution of the said will, intermarried with and is now the wife of your petitioner, the said *A. B.*, and that there is issue of the said marriage, ten children, viz. your petitioner, the said *A. B.*

the younger, and *E. B.*, who have respectively attained the age of twenty-one years. And the said [*names of the infants*] who are all infants under the age of twenty-one years. CHAP. XIV.

That the power of sale contained in the said indenture of settlement was never executed, and, by the decease of the said *W. M.*, the same is now become incapable of taking effect; and that the said sums of £—— and £—— still remain charges upon the said estates comprised in the said will of the said testatrix, And the several legacies bequeathed by the said will and codicil of the said testatrix still also remain due and unpaid, and the personal estate of the said testatrix hath been exhausted in payment of her personal and testamentary expenses and debts.

That the trustees of the said term of 500 years are wholly unable to raise money by mortgage of the said messuages, lands, tenements and hereditaments comprised in the said term of 500 years, for the purpose of carrying the trusts of the said term into execution.

That the said messuages, lands, tenements and hereditaments, situated at ——— aforesaid, are very conveniently situated for sale, and it is estimated that, by an absolute sale of the fee simple thereof, a sufficient sum might be raised for the purpose of carrying the trusts of the said will and codicil into execution: And it would be highly beneficial to your several petitioners, and to all persons claiming or to claim under the several devises, limitations and bequests hereinbefore stated, that the said messuages, lands, tenements and hereditaments, situated at ——— aforesaid, should be vested in trustees, in order that the same should be absolutely sold and disposed of, and the money to arise thereby, after satisfying all the expenses to be incurred in effectuating any such sale or sales, should be applied in discharge of the said several sums of £—— and £——, and all interest which may be then due thereon, and of the several legacies bequeathed by the said will and codicil hereinbefore mentioned, and that the residue thereof (if any) should be invested in the purchase of other estates, to be settled to, for, and upon such of the uses, trusts, intents and purposes limited, created, or declared by

CHAP. XIV.

the said will, of or concerning the manor, messuages, lands, tenements and other hereditaments comprised therein as are still subsisting and capable of taking effect, but, by reason of the limitations in the said will contained, these objects cannot be effected without the authority of Parliament.

Therefore your petitioners most humbly pray your Lordships, that leave may be given to bring a bill into your Right Honourable House for effectuating the purposes aforesaid, and for such further and other relief in the premises as to your Lordships in your great wisdom shall seem meet.

And your petitioners shall ever pray, &c.

Report of the judges on a reference to them of the preceding petition.

To the Right Honourable the Lords spiritual and temporal in the Imperial Parliament assembled,  
In pursuance of your Lordships' order to us, referring to us the humble petition of *A. B.*, &c.  
hereunto annexed,

We find that, &c. &c.,

And it was proved to us, that, &c.

And it was further proved to us, that, &c.

[*And so on for each "And that" of the petition.*]

And we certify to your Lordships, that the several persons who have signed the petition are all the parties interested in the consequences of the bill, and we have perused the bill annexed, and are of opinion that it is fit and proper to be passed into a law, subject to such alterations and amendments as to your Lordships shall seem proper.

Given under our hands, this —  
day of —, 18—.

Preamble of the bill.

The general scope and provisions of the act will, of course, vary with the nature of the objects to be effected by it. The preamble is, in general, a mere echo of the allegations of the petition, concluding with a suggestion (on a bill for the sale of settled lands, for example,) "that

“ said [*petitioners*] are fully satisfied, that it will be for CHAP. XIV.  
 “ the benefit of themselves, and all other persons who  
 “ may be interested in the said real estates, under the  
 “ said testator’s will, that the sale of the said estates  
 “ should be completed and carried into effect, or other-  
 “ wise that the same should be resold, under the direc-  
 “ tion of the said court; and, for that purpose, that the  
 “ said *A. B.* and *C. D.* of, &c. should be enabled  
 “ to sell and convey the fee-simple and inheritance of  
 “ all the said testator’s real estates, by his said will  
 “ charged with the payment of his debts, instead of  
 “ demising or appointing them for a term of five hun-  
 “ dred years, for the purposes, and in the manner, in  
 “ the said decree mentioned, but, by reason of the  
 “ trusts and limitations contained in the said will, and  
 “ the minority of the said *E. F.* the first tenant in tail  
 “ thereunder, such objects cannot be accomplished  
 “ without the aid and authority of Parliament.”

The bill then proceeds to vest the estate in trustees, Enacting part, whereby the estate is vested in trustees.  
 free from “ all the estates, uses, trusts, limitations,  
 “ powers and provisoes” of the settlement, in trust,  
 as soon as conveniently may be, and the approbation and  
 consent of all necessary parties can be had, to sell,—with  
 a declaration, that the purchase-money shall be paid Purchase-money to be paid into the Bank of England.  
 into the Bank of England, in the name and with the  
 privity of the Accountant-General of the Court of  
 Chancery, to be placed to his account there, “ *ex parte*  
 “ the purchasers of the settled estates of the late —.”

Out of the money so paid into the Bank, the costs Disposition of the purchase-money.  
 and expenses preparatory to and attending the soliciting  
 and obtaining the act, and also all costs and expenses  
 attending the said sales, and the execution of the trusts  
 of the said act, are to be first paid,—and the residue and

## CHAP. XIV.

surplus of such monies, with all convenient speed, to be laid out and invested, with the consent of proper parties, and under the direction of the Court of Chancery, in the purchase of other lands, to be settled along with other estates, or for any other purpose, according to the intention of the parties obtaining the bill. And until the application of the said surplus and residue, the Accountant-General must lay out the monies arising from the sale in the purchase of Navy, Victualling or Exchequer Bills.

There is also a direction for the Court of Chancery to order taxation and payment of costs,—the usual trustee clauses,—a clause saving the rights of all persons not parties to the act,—and generally what is called the evidence clause.

Bill to sell devised lands, for the purpose of paying off testator's debts, and to invest the residue.

This is the outline of an Estate Bill, for the sale of settled lands. The bill of course will vary in each particular case, and must be framed with a view to its particular circumstances. The object may be, for instance, to sell the estate of a deceased testator, “for the purpose of paying off his debts, and investing the surplus for the benefit of his heir at law;” and then, of course, after the usual provision for payment of the costs of the bill, the trusts will be to pay off mortgages according to their priority,—and, after the payment of mortgages, then, in payment and discharge, under the direction of the Court of Chancery, of all debts, as well by specialty as by simple contract, of the said deceased,—and the ultimate surplus to be invested in the purchase of freehold and copyhold estates of inheritance, (whereof not more than one-sixth [say] shall be of *copyhold* tenure,) such purchase to be approved by the Court of Chancery, and the premises, when purchased, to be conveyed, settled and assured, to the said [heir at law,] his



heirs and assigns. There is also, generally, in cases of this kind, a provision for the maintenance of the person entitled to the ultimate surplus, such maintenance to be obtained, from time to time, on the petition of his guardian, or of the person or persons entitled, for the time being, to the receipt of the rents and profits of the lands and hereditaments to be purchased.

CHAP. XIV.

The act sometimes vests the estate in trustees, to sell, under the direction of the Court of Exchequer, and then all the powers hereinbefore mentioned as being given to the Court of Chancery, are given to the Court of Exchequer.

The sale is sometimes to be effected under direction of Court of Exchequer.

The provisions of a bill, to enable tenements for life, under a settlement, to grant building leases, differ again materially from those which are necessary in the two cases which have been considered. The principal provisions are, that the tenant for life shall have power to grant building leases of a *part* of the premises, (say a moiety,) or of *the whole*, with the consent of the persons in remainder;—that it shall be lawful for the tenant for life to enter into contracts to grant building leases, provided the contract contain certain clauses for re-entry, in case the stipulations, as to building, repairing, improving, &c., required by the act, are not fulfilled, or leases and counterparts thereof are not executed, and the expenses paid, according to agreement,—such contracts to be binding on all persons who are, or may, become entitled under the settlement.

Bill to enable tenant for life to grant building leases.

It is usual also to add a declaratory enactment, that where a lease is granted in pursuance of a contract, that it shall be valid, notwithstanding the terms of the contract may not have been exactly pursued, and that

CHAP. XIV. after the lease shall have been executed, the contract shall no longer form any part of the evidence at law or in equity to the benefit of the same lease.

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Bills for the enclosure of waste lands may also be said to be, in a certain sense, private bills affecting the transfer and conveyance of landed property; but the consideration of this subject, with the requisite details, is not compatible with the plan of these pages (1).

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**Divorce Bills.** Divorce Bills also, to a certain extent, affect the transmission of property. The preamble usually states the marriage of the parties, their cohabitation, the elopement, adultery,—the action at common law (if any) and damages,—and the sentence of the Ecclesiastical Court. It then enacts the dissolution of the marriage, and that either of the parties may marry again, as if “the other were actually dead;” and that if the husband marry again, he shall be entitled to his estate of curtesy in the lady’s lands, and she to her thirds, dower, &c. of his estate: and then the bill lastly enacts, as between the parties to the divorce, that the lady shall thenceforth be barred and excluded from all dower, free-bench and thirds, at common law, &c., of which the husband then is, or may, at any subsequent period, become entitled to or possessed of; and that, on the other hand, he shall be barred and excluded from all estate, real and personal, and from all powers and authorities, which she is now entitled to and may exercise, or may

(1) See 1 Atk. Conv. p. 544, where all the cases are collected, and their substance stated.

at any future time acquire, or be entitled to exercise; and that she, her heirs &c. “shall and may hold and enjoy the same, and every of them, and all provisions made and settled for her on her marriage, for all her and their estate, and interest therein, for her and their own proper use, benefit and advantage, exclusive of the said [*husband*,] his heirs, executors and administrators, and all and every other person and persons whomsoever claiming, or to claim, by, from, or under him.”

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CHAP. XIV.

There is another class of Private Bills, called Naturalization Bills, principally passed with a view to enable an individual to hold and transmit real estate. Their nature and import will be sufficiently understood, from the following precedent of such a bill:—

Naturalization Bills.

HUMBLY SHEWETH your most excellent majesty, the lords spiritual and temporal, and commons in this present parliament assembled, [*here state the name of the person seeking to be naturalized, of whom he was born, and the country he was born in,*] professing the Protestant religion, and having given testimony of his loyalty and fidelity to your majesty and the good of the United Kingdom of Great Britain and Ireland, That it may be enacted, AND BE IT ENACTED by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal and commons in this present parliament assembled, and by the authority of the same, that the said shall be, and he is hereby from henceforth naturalized, and shall be adjudged and taken to all intents and purposes to be naturalized, and as a free-born subject of the said United Kingdom, and he is and shall be from henceforth adjudged, reputed and taken to be in every condition, respect and degree free, to all intents, purposes and con-

CHAP. XIV. instructions, as if he had been born a natural subject within the said United Kingdom.

AND BE IT FURTHER ENACTED, That the said  
shall be, and he is hereby enabled and adjudged able, to all intents, purposes and constructions whatsoever, to inherit and be inheritable and inherited, and to demand, challenge, ask, take, retain, have, keep, and enjoy, all or any manors, lands, tenements, hereditaments, goods, chattels, debts, estates, and all other privileges and immunities, benefits and advantages, in law or in equity, belonging to the liege people and natural-born subjects of the said United Kingdom, and make his resort or pedigree as heir to his ancestors, lineal or collateral, by reason of descent, remainder, reverter, right, title, conveyance, legacy, or bequest whatsoever, which hath, may, or shall, from henceforth descend, remain, revert, accrue or grow due unto him, as also from henceforth to ask, take, have, retain, keep and enjoy all manors, lands, tenements and hereditaments which he may or shall have by way of purchase or gift of any person or persons whomsoever, and to prosecute, pursue, maintain, avow, justify, and defend all and all manner of actions, suits and causes, and all other things to do as lawfully, liberally, freely and surely as if he, the said

had been born of parents being natural-born subjects of the said United Kingdom, and as any person born or derived from parents being natural-born subjects of the said United Kingdom may lawfully or in anywise do; and he, the said , in all things, and to all intents and purposes, shall be taken to be and shall be a natural liege subject of the said United Kingdom, any law, act, statute, provision, custom, ordinance or other matter or thing whatsoever, had, made, done, promulgated, proclaimed or provided to the contrary thereof in anywise notwithstanding.

AND BE IT FURTHER ENACTED, That he, the said  
, shall not hereby be enabled to be of the privy council or member of either house of parliament, or to take any office or place of trust, either civil or mi-

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## CHAPTER XV.

### OF THE GRANT OF RENT-CHARGES AND ANNUITIES.

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- Grant of rent-charge out of freehold estate. When a rent-charge is to be secured out of freehold lands, the way is, to "give, grant, bargain, sell and confirm the annuity to the annuitant for and during the term of his natural life, to be issuing out of such and such lands, *habendum* for life, with powers of distress and entry, And, subject thereto, to the use of a trustee for a term of 99 years, In trust, in case the annuity should be in arrear by so many days, to raise the same out of the rents, or by mortgage, or sale of the premises comprised in the term, And subject thereto the premises to be To the use of the grantor in fee." If no term were limited to a trustee, and no distress were to be found upon the premises, the annuitant would be unable to recover the annuity, and therefore a term is indispensably necessary. If the annuity is to be secured out of leasehold lands, then, as it would be inconsistent to grant an annuity for life issuing out of a chattel interest, the whole interest must be vested in trustees.
- Grant of rent-charge out of leasehold. If the annuity is to be secured out of freehold and leasehold property the freehold may be demised for a term of years, and the leasehold assigned to trustees, In trust
- Grant of rent-charge out of freehold and leasehold.

(after the usual provisions for paying the reserved rent and renewing the lease) to raise and pay the annuity. Or, if the freehold be nearly sufficient, in point of yearly value, for securing the annuity, it may be granted to be issuing out of the freehold in the usual manner in which a term may be vested, as in common cases, and the leaseholds may be assigned to the same trustee in whom the term is vested, "In trust, in case the annuity shall be in arrear, to raise the same out of the freehold and leasehold premises, And, subject thereto, the leasehold may be declared to be In trust for the owner, his executors, &c.," and the usual proviso may be inserted for ceasing the term in the freehold.

In almost every case a proportional part of the annuity should be secured to the representative of the annuitant. Grant of a proportional part. This cannot be inserted in the grant of the annuity, but must be provided for under the trusts of the term.

Annuities, save in special cases, (1) are not subject to be apportioned under the stat of 11 Geo. II. c. 195, 115, because they are payable half-yearly, and are not considered to be accruing *de die in diem*; for the same reason money in the funds is not apportionable but money secured on mortgage is.

The reason appears to be, because it would be difficult for infants to find credit for necessities if the payment depended on their living to the end of the quarter. The case cited above depended on similar circumstances, the annuity being for the separate maintenance of a *feme covert*, and the payment not being *forward* pay-

(1) Where an annuity, payable to a wife separated from her husband, and secured by bond, with a penalty, was apportioned, maintenance for younger children is always apportioned for the reason given in the case here cited.—2 Bl. Rep., 1016.

## CHAP. XV.

ments, by way of maintenance for the ensuing quarter (which might make a difference), but payable at the end of each quarter, in order to discharge the expenses incurred in the three preceding months, it was therefore judged proper that it should be apportioned.

Where rent is reserved upon a lease, which binds a reversioner or remainder-man, as leases under a power do, the executors or administrators of tenant for life are not entitled to a proportion of the rent from the last day of payment, because the lease has continuance after his death, and the statute extends only to cases where the lease determines by the death of the tenant for life; but the devisee, or heir-at-law, of a person seised in fee, is entitled to the whole rent accruing from the preceding day of payment. All arrears, however, actually become due to the testator or intestate in his life-time, and make part of his personal estate.

For the same reason, the executors or administrators of rectors, vicars, masters of hospitals, and other spiritual persons, are entitled to a proportion of the rents reserved for lands let on leases or by agreements, *which determine by their deaths, resignation, &c.*, but not for lands let on leases, for three lives, or twenty-one years, as these have continuance and bind the successors, and reserved rents for those which become due in the life-time of the rector, &c., though not received till after his death, belong to his executors or administrators.

Mode of charging an annual payment by deed.

Where lands, subject to a rent-charge, or other annual incumbrance, are sold in lots, under a stipulation that the whole of the charge shall be borne by the purchaser of a particular lot, or that it shall be distributed among the purchasers in certain proportions, it is usual for the purchasers to protect themselves, by means of a



deed of indemnity. The mode of effecting this object, as will be seen by reference to the old collections of conveyancing precedents, was by simply reserving a power of distress for the sums which a purchaser, so exempted, should be called upon to pay, and for all expenses incurred thereby; but, at the present day, the practice is to limit a rent-charge out of the lands to be exclusively charged, equal in amount, at least, to the original charge, with powers of entry and distress, and for perception of rents, in case of non-payment. The following will exhibit the form in which a rent-charge, or other annual payment, is usually charged on lands.

AND WHEREAS the said [*grantor*] hath lately contracted for the sale of the said messuages or manor-house, and hereditaments hereinafter described, together with the hereditaments charged with the payment of the said yearly rent or sum of £——; and it is intended by the said [*grantor*], that the said messuages, &c., hereinafter described, shall be exclusively charged with the payment of the said yearly rent or sum of £——. AND upon the treaty for the sale of the said messuages, &c., hereinafter described, the said [*grantor*] did stipulate with the purchaser thereof, that such purchaser and his heirs should exclusively pay the said yearly rent or sum of £——.

Recital of contract for sale, and intention to charge the hereditaments sold, exclusively with the annual charge.

NOW THIS INDENTURE WITNESSETH, that to the intent that all and singular the hereditaments charged with and subject to the payment of the said yearly rent or sum of £——, (except the hereditaments hereinafter described, and hereby charged therewith,) and also that the said [*grantor*,] his heirs and assigns, and the purchaser and respective purchasers of all or any part of the said hereditaments, (except as aforesaid, and his heir and their heirs and assigns, may be henceforth exonerated and indemnified from the said yearly rent or sum of £——, so payable to

Witnessing part, grant of rent of £——.

CHAP. XV.

the vicar and churchwardens, for the time being, of the parish church of, &c. aforesaid, AND in consideration of 5s. to the said [*grantor*,] in hand, paid by the said [*grantee*] at or before, &c., the receipt, &c. He the said [*grantor*] HATH given, granted and confirmed, and, by these presents, DOth, &c., unto the said [*grantee*,] his heirs and assigns. for ever, one annuity, or clear yearly rent or annual sum of £——, of lawful money current in England, to be yearly issuing, payable, received, and taken by the said [*grantee*,] his heirs and assigns, out of and from, and to be charged and chargeable upon ALL, &c. [*parcels and general words.*]

*Habendum.*

TO HAVE, hold, receive, perceive and enjoy the said annuity, clear yearly rent or annual sum of £——, and every part thereof, unto the said [*grantee*,] his heirs and assigns, for ever, the same to be payable and paid at or in, &c., in the said county of, &c., by two equal half-yearly payments, between the hours of, &c., of the several days following, (that is to say,) the —— day of ——, and the —— day of ——, in every year, free from taxes, and without any other deduction whatsoever, the first payment of the said annuity, or yearly rent, to be made on the —— day of —— next ensuing, [*add power of distress and entry.*]

Declaration of trusts.

AND it is hereby agreed and declared, between and by the said parties hereto, that he the said [*grantee*,] his heirs and assigns, shall and do stand seised of and interested in the same rent-charge hereinbefore granted, and every part thereof, with the remedies hereinbefore reserved for the recovery thereof,

IN TRUST thereby, and therewith, to save harmless and keep indemnified, the said [*grantor*,] his heirs, appointees and assignees, and the lands and other hereditaments, charged by virtue of the said recited will or otherwise, with the payment of the said yearly rent or sum of £——, payable to the vicar and churchwardens, for the time being, of the parish church of, &c. aforesaid, by virtue of the same will, (except the said messuage, &c. hereinbefore described,

and hereby charged with the payment of the said yearly rent or sum of £——, hereby respectively granted, as aforesaid), and the owner or respective owners for the time being, of all or any of the said lands or other hereditaments, except as aforesaid, of and from the payment of the said yearly rent or sum of £——, by the said recited will, made payable to the said vicar and churchwardens of the parish church of &c., for the time being, and for that purpose in case default shall, at any time or times hereafter, be made in payment of the said yearly rent or sum of £30, made payable by virtue of the said recited will as aforesaid, or any part thereof, at or on the days by the same will appointed for payment thereof, then, and so often as the same shall happen,

UPON TRUST, that the said [*grantee*], his heirs or assigns shall and do, immediately after such default being made, recover and receive the said yearly rent or sum of £——, hereby granted as aforesaid, and shall and do pay the same yearly rent or sum of £——, and the arrears thereof, or so much thereof as shall be sufficient for that purpose, unto the vicar and churchwardens of &c., aforesaid, in or towards payment and satisfaction of the said yearly rent or sum of £——, by the said recited will made payable to the said vicar and churchwardens of the said parish-church of &c., for the time being as aforesaid, or so much thereof as shall be then due and owing, or in arrear, And subject and without prejudice to the payment of the said yearly rent or sum of £——, by the said will made payable as aforesaid,

UPON TRUST, that the said [*grantee*], his heirs and assigns, shall and do stand seised of and interested in the said yearly rent or sum of £30, hereby granted, or so much thereof as shall not from time to time be applied for the purposes aforesaid,

IN TRUST, for the person or persons for the time being entitled to the said messuage &c. hereinbefore described, and hereby charged with the payment of the said yearly rent or sum granted as aforesaid, his, her or their heirs, executors, administrators or assigns.

## CHAP. XVI.

### APPOINTMENT OF NEW TRUSTEES.

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Of the appointment of new trustees of freehold property.

In all properly drawn deeds, by which trusts are created, there is a power for the appointment of new trustees, in case "the trustees, or any of them, should die, or be desirous to be discharged, or depart beyond the seas, or refuse or become incapable to act," before the trusts have been all fulfilled, or become unnecessary or incapable of taking effect. When, therefore, in any of these events, it becomes necessary to fill up the original number, under a power such as stated above, the usual mode in the case of *freehold* property is, for the person in whom the power of appointment is vested, to nominate by deed the new trustees, and then for all the continuing or surviving trustees, or the heirs of the survivor, to make a conveyance by lease and release, "to the new trustees and their heirs, to the use of the old and new trustees and their heirs."

Of appointment of new trustees of leasehold &c.

This mode, however, is obviously not applicable to the case of leasehold, terms of years, or other personal estate, inasmuch, as they are not within the Statute of Uses; and therefore as to this kind of property, another mode of proceeding is necessary. In this case, the way is for all the continuing or surviving trustees to convey

to A, a third person (called the *middle-man*), in trust to re-convey to the continuing and new trustees jointly, and then the middle-man, by indorsement, re-conveys to the continuing and new trustees in trust for the purposes of the deed or will. The assignment and re-assignment are sometimes executed previous to the deed nominating the new trustees, and then this latter deed recites the settlement, or will, creating the trusts, (the power for appointment of new trustees very fully,) and takes notice of such other facts as may be necessary to shew the present state of the trust-funds, and then of the death or wish to retire, &c. of one or more of the trustees, according to circumstances,—the desire of the parties, who have the power of appointment, that the persons to be named shall be appointed in the stead or place of the deceased or retiring trustees, and either alone or jointly with the continuing or surviving trustees,—the deed then, after reciting the assignment and re-assignment, witnesseth, that for effectuating such desire, and by force and virtue, and in exercise &c., he the said &c. appoints the persons so named to be trustees of the before recited settlement (or will), with a declaration that they shall stand and be possessed of the trust-funds, in the same manner as if their names had been inserted in the original deed (1).

Where the property is part freehold and part leasehold, these two modes must be combined. As where the trust-estate consists of a mortgage in fee, and certain leaseholds, the mortgage may be transferred by indorsement to the new trustee, to the use of the new and surviving trustees jointly. By a second deed, after reciting the instrument creating the trusts &c., and also the mort-

Appointment of new trustees, where the property is both freehold and leasehold.

(1) See Atk. Prec. in Conv. 485, for a precedent, illustrative of these observations.

## CHAP. XVI.

gage, and the transfer of it, the survivors of the original trustees appoint and nominate the new trustee, and by a second witnessing clause assign the leasehold to a middleman, who, by indorsement, re-conveys it to the new and old trustees jointly. (1)

Had the mortgage been for a term, the whole transaction might have been effected by two deeds, as the new trustees could have been nominated, and the mortgage term and leasehold assigned to the middleman by one deed, and the re-assignment by indorsement would have completed the transaction. (2)

Appointment  
of new trustees  
by Court of  
Chancery.

If it happen that the appointment of new trustees has become necessary, but that in the instrument creating the trusts there is no power for that purpose, or the power which is given does not embrace the actual contingency, the Court of Chancery, if it have power over the *legal* estate, will make the appointment. (3)

The mode of proceeding is by bill,—and in the case (say) of a surviving lunatic trustee not having been found such by inquisition, after bill filed, on a petition *in the cause* supported by an affidavit shewing the lunacy of the surviving trustee, a reference will be ordered to the Master to enquire whether the question comes within the 6th Geo. 4th, and if so, to appoint a new trustee; and then on a second petition to be addressed “In the matter of the act of the 6th Geo. 4th, “and of *A. B.*, a person of unsound mind, not being “found so by inquisition,” and praying for a conveyance of the trust premises to the petitioners, (the intended new trustees,) and that his Lordship will appoint such person as he shall please, to execute a con-

(1) See Atk. Prec. 601, for deeds to illustrate these remarks, where will be found an appointment of new trustees under a power given by will.

(2) *Ib.* 751.

(3) *Ib.* 208.

veyance for that purpose by a deed to be approved by the Master,—a conveyance will be directed, and it is not necessary that the Master's report should be confirmed. Where the legal estate has become vested in a person lunatic, &c., and the *celles que trust* have the power of appointing new trustees, then a bill is not necessary but only a petition, such as has been just described.(1)

The mode of effecting a conveyance of trust-property, under an order of the Court of Chancery, has been already explained. (2).

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## CHAPTER XVII.

### OF COMPOSITION DEEDS, &c.

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The parties to a deed of this description, are the debtor, the trustees, and all or so many of the creditors as shall choose to avail themselves of the arrangement. The recitals will, of course, state briefly, that the debtor is seised of, or otherwise entitled, to the property, which is to be the subject of the conveyance,—that his affairs are in such a state of embarrassment that he can no longer meet the demands of his creditors,—that he has requested them to accept a composition in lieu and full discharge of their debts, which they (or so many of them as concur in the deed,) have agreed to do, on having the whole of his property conveyed to trustees, in trust for their benefit, the produce thereof to be equally divided among them, in proportion to their

Parties &c. to  
a composition  
deed.

(1) *Miller v. Smales*, MS. Ch. 13 Feb. 1830. (2) See ante, p. 68.

## CHAP. XVII.

several debts, subject to the agreements, declarations, and provisions, thereafter contained ;—and, lastly, that the debtor “is desirous of executing to the said “[*trustees*], the conveyance and assignment hereinafter “contained, for the purposes hereinafter mentioned.”

Witnessing  
part.

The deed then, in performance of the said agreement, and for the purpose of effecting such, the desire of the said debtor, and for a nominal consideration, conveys and assigns all his estate, real and personal, to trustees, upon the trusts thereafter mentioned.

Trusts of a  
composition  
deed.

The trusts may be, in the first place, to sell immediately, if such be the intention of the parties, or on some contingency; (if it be so intended) and to apply the produce arising from the annual profits, interest &c. or mortgage or sale, in the payment of all costs incurred in the preparation of the said deed ;—and, in the next place, to pay off all debts, or a proportionate part of them, in such manner as the parties shall agree upon.

In a voluntary settlement, which the author recently saw drawn up on the contemplation of insanity, the trusts, after the usual provision for payment of costs, were “that the said trustees do and “shall pay off and discharge, all mortgages and “other incumbrances affecting all or any part of the “said lands and other hereditaments hereby released, “or intended so to be, according to their respective “priorities; and all interest now due or to become due “thereon;” and, in the next place, that the said trustees “do and shall pay, satisfy and discharge, or otherwise settle, adjust, compound and compromise the “other debts now due from the said [*debtor*], to any “person or persons whomsoever, or such of them only, “or such parts thereof only, as he, the said [*trustee*],



“ his executors, administrators or assigns shall think  
 “ proper ; and either altogether, or by such instalments,  
 “ and with or without interest thereon respectively, and  
 “ at such time or times respectively, and with such  
 “ preference of what nature soever, and upon such evi-  
 “ dence respectively, and upon such terms with respect  
 “ to the creditors releasing the said [*debtor*] from his  
 “ debts due to them respectively, and in all other res-  
 “ pects, in such manner as to the said [*trustees*], his  
 “ executors, administrators and assigns, shall, in his or  
 “ their uncontrollable discretion, seem expedient and  
 “ proper.”

There is usually a proviso, that the conveyance for the benefit of the general creditors, shall not prejudice specific securities in the hands of individual creditors, but that dividends shall be paid them only on the surplus of their debts, unless they give up their securities. There must be also a power to pay off securities. There should also be a declaration that the creditors shall not be paid interest after a given date,—that the deed shall be void unless signed by all the creditors to the amount of £—— or upwards within [*two*] months, and on that event, the premises to be re-assigned and the creditors to be in their original state as to their debts,—with powers for the trustees to act immediately in the execution of the trusts thereby created.

There are also several other provisions, such as for the creditors to deliver in a schedule of their claims upon oath,—that the letter of license shall be void, if the debtor conceal any part of his property,—(where there are several debtors) that the release to one of them shall not discharge the others, if they make default in the performance of any of their covenants,

CHAP. XVII.

Proviso that specific securities shall not be affected.

Creditors to deliver in a schedule of their claims.

Titles of license void if &c.

CHAP. XVII.

but that thenceforth they shall be wholly liable and subject to the full amount of the debts,—that the creditors, intending to take the benefit of the trust-deed, shall subscribe a declaration engaging to accept the composition, and to execute a letter of license.

Release of  
debts.

The deed lastly witnesses that, in consideration of the premises, the several persons parties to the deed release the creditor from “all actions, suits, bills, bonds, “writings, obligations, debts, &c.” which they or any of them have against the said debtor, his heirs, executors, &c., or his estate or effects, which are due and owing to them or any of them from the said debtor, and all interest, &c. other than and except the security effected, or intended to be effected, “by means of these presents, &c., “and the trusts hereby declared as aforesaid.”

The letter of license, with covenants to execute a release, may either form part of the general trust-deed or may be by a separate deed, according as may appear more suitable to the parties. If the affairs of the debtor be very complicated, and his property extensive, and variously charged by mortgages, annuities, judgments, &c., the transaction will be most commodiously arranged by three deeds, the first being a simple conveyance to trustees, in trust to sell, for the purposes to be declared by another deed,—the second deed will declare those purposes and trusts,—and the third will be a letter of license, with covenants to execute a release.

Besides the general provisions stated above, as being proper to be contained in a deed of this description, there may be, of course, many others, the nature of which will depend on the situation of the parties and the peculiar circumstances of the case, and these must, of course, be left to the discretion of the draftsman who

may be employed on the particular occasion. The two following may be noticed as occurring occasionally in composition-deeds, namely—a proviso that no creditor shall be entitled to a dividend unless he make affidavit of his debt before a Master in Chancery, or, being a Quaker, shall make solemn affirmation thereof, such affidavit or affirmation to be left with the trustees, on or before the day appointed for payment of the dividend.—

The other point, to which reference is here made, is a proviso on a deed of sale, that the trustees may act by agent: minute provisions of this kind are, however, necessary only in cases of considerable importance and delicacy as in the case of a nobleman's affairs, in which it may be necessary that very large powers should be given, and that there should be a very minute inquiry into the validity of the several claims, and that there should be clear evidence of fraud on the part of the creditors, where these embrace long unsettled tradesmen's bills, or running transactions with money-lenders, brokers, &c.

CHAP. XVII.

Proviso that no dividend shall be payable without an affidavit, &c.

That trustees for sale may appoint an agent.

FINIS.



# INDEX

## (TO THE FORMS.)

---

### ADMINISTRATION :

- Recital of limited letters of, 34.
- of letters of *de bonis non*, *ib.*

### APPOINTMENT. See *Receiver*.

### ASSIGNMENT :

- Of several terms to attend ; recitals in, 180.

### BEQUEST :

- Of pictures, books, furniture, &c. as heir-looms, 121.
- Of residue and appointment of executors, 122.
- By codicil, 123.

### BILL :

- For the naturalization of an alien, 629.

### CODICIL :

- Bequest by, 123.

### COVENANTS :

- In mortgage for title (short form), 57,
- Commencement of to purchaser for persons entitled to shares of the purchase-money of lands sold, 59.
- When one of the grantors is tenant for life, and the others have the remainder in fee, *ib.*
- For title, alteration in, where the estate is limited to uses, &c. to prevent dower, *ib.*
  - when the estate is limited to uses or upon trusts, 60.
- To obtain conveyance from infant trustee at 21, *ib.*
- To allow bills of exchange to be drawn and to accept and afterwards pay the same, 61.
- To pay off a mortgage-debt affecting an estate settled by the same deed, 62.
- To procure release of a portion when an infant trustee shall attain 21 or die, *ib.*
- To pay accepted bills of exchange when due, 63.
- For title to personalty, *ib.*
- For production of title-deeds where held by vendor (short form), 65.
- By greatest purchaser at an auction, 66.

### DECLARATION :

- Of uses, commencement of, where the conveyance is both by appointment and release, 48.

**DECLARATION—continued.**

- Of uses or trust, commencement of, *ib.*
- That clauses for appointment, indemnity, &c. of trustees shall be applicable to other deeds, 50.
- In wills, of the trusts of a term, 107.
- Of the trusts of leasehold, 120.
- As to the power given to trustees for the payment of debts out of real estate,—personal estate, nevertheless, to be the primary fund for payment of debts, 108.

**DEVISE :**

- General, to trustees for a term, 106.
- Of copyhold upon the same trusts as freehold, 118.
- Of leasehold upon trusts after declared, 119.

**DIRECTION :**

- In articles for clauses for the appointment and indemnity of trustees, 50

**ESTATE BILL :**

- Petition for, 260.
- Judges' report thereon, 264.

**EXCHANGE :**

- Proviso for re-entry in case of eviction, 54.
- Power of in wills, 117.

**EXECUTORS :**

- Appointment of, and residuary bequest, 122.

**FINE :**

- Recital of deed and fine whereby estates stand limited, 35.

**HABENDUM :**

- Of personalty with short power of attorney, 42.

**INFANT TRUSTEE :**

- Recital of a trustee, being an infant, with covenant to obtain conveyance from him at twenty-one, 30.
- Covenant to obtain conveyance from him at twenty-one, 60.
- Recital of proceedings for obtaining an order for him to convey, 31.
- Covenant to procure release of a portion when he shall attain twenty-one or die, 62.

**JUDGES' REPORT :**

- On petition for an estate bill, 264.

**LEASES :**

- Proviso that lessees shall be all answerable to the lessor for the rent, but as between themselves shall pay the same in certain proportions, 55.

**LIMITATIONS :**

- In strict settlement, 80.
- Of rent-charge, 275.

**MORTGAGE :**

- Covenants for title (short form), 57.

**MORTGAGE—(continued.)**

For a term, proviso and covenant to pay, 147.

In fee, proviso and covenant to pay, 148.

Proviso for redemption at the end of a given number of years, with provisions in case of default of the regular payment of interest, 149.

On transfer of stock, 151.

Proviso, in a mortgage under a trust term, with bond and covenant by tenant for life, that the land shall be the primary security, *ib.*

In trusts for sale for securing a specific sum and interest, 152.

Power for mortgagor to sell any part of the estates mortgaged, a proportional part of the purchase-money being paid in reduction of the mortgage, 53.

variation in, when the mortgage

is for a term, *ib.*

Power for the mortgagor to pay off any part of the debt before the day appointed, by way of instalments of not less than a certain sum, 54.

**NAME AND ARMS :**

Proviso for taking in a will,—and for that purpose to apply for an act of parliament,—limitation over in default of using them,—and disposition of the intermediate rents and profits, 110.

**NATURALIZATION BILL :**

Form of, 269.

**PATENT :**

Recital of, Form 1, 39.

, Form 2, *ib.*

**PETITION :**

For private act of parliament to sell, &c. 260.

Judges' report thereon, 264.

**POWER :**

To trustees, with consent of wife, to lend trust-moneys to husband on his personal security, and to call in the same and to lend to him again from time to time, 51.

Of sale and exchange, alteration in where the legal estate is vested in trustees, *ib.*

General of charging lands, 52.

For mortgagor to sell any part of the estates mortgaged, a proportional part of purchase-money being paid in reduction of the mortgage, 53.

Variation in, when the mortgage is for a term, *ib.*

For the mortgagor to pay off any part of the debt by way of instalments of not less than a certain sum, 54.

For parents jointly, and survivor, to appoint lands among children, 71.

**POWER—**(*continued.*)

- In wills for tenant for life to jointure, 113.
  - to raise portions, 114.
  - of leasing to tenants for life, 116.
  - of sale, the purchase-money to go upon the trusts of personal estate, *ib.*
  - of exchange, 117.

**PROVISO :**

- In an exchange-deed for re-entry in case of eviction, 54.
- That lessees shall be all answerable to the lessor for the rent, but as between themselves shall pay the same in certain proportions, 55.
- Where the purchase-money is to be paid by instalments, 192.
- In default of payment of any instalments for rendering the whole payable immediately *ib.*
- and covenant to pay in a mortgage for a term, 147.
  - in fee, 148.
- For redemption at the end of a given number of years,—with provisions in case of default of the regular payment of interest, 149.
  - on re-transfer of stock, 151.
- In a mortgage under a trust-term, with bond and covenant by tenant for life that the land shall be the primary security, *ib.*
- For converting tenant in tail, born in testator's lifetime, into tenant for life, 109.
- For taking name and arms, 110.

**PURCHASE DEEDS :**

- Proviso where the purchase-money is to be paid by instalments. 192.
  - in default of payment of any instalments for rendering the whole payable immediately, *ib.*

**RECEIVER :**

- Appointment of,

**RECITAL :**

- Of a will partly revoked, 27,
  - and limitations in a deed of partition, *ib.*
- Of an allotment by way of exchange under an inclosure act, 29.
- Of a trustee, being an infant, with covenant to obtain conveyance from him at twenty-one years, 30.
- Of proceedings for obtaining an order for infant trustee to convey, 31.
- Of a sale by a trustee, *ib.*
- (Short) of uses in a marriage-settlement, 32.
- Of descent of trust estates to the heir of the trustee, with the latter's intestacy, *ib.*
- Of death of the mortgagee in fee and descent of the estate to his heirs, *ib.*



**RECITAL—(continued.)**

- Of acceptance, &c. of bills of exchange for money agreed to be advanced on mortgage, 33.
- Of a provisional agreement, subject to the approbation of, and confirmation by, a vestry, *ib.*
- Of limited letters of administration, 34.
- Of letters of administration *de bonis non*, *ib.*
- Of proceedings in the Court of Chancery for establishing a will, *ib.*
- Of deed and recovery, whereby estates stand limited to particular uses, 33.
- Of deed and fine, whereby estates stand limited, 35.
- For a conveyance and covenant to surrender, where the copyhold and freehold parts are not sufficiently distinguished, 35.
- Of a bill of revivor, *ib.*
- Of deed to make the tenant to the *præcipe* and the subsequent recovery, 36.
- Of consent of *cestui que trust* to a contract for purchase, and raising the consideration by sale of stock, *ib.*
- Of inclosure act, and contract for sale of all vendor's estates in the parish, 37.
- Of agreement for splitting the consideration-money, 38.
- Of the investment of a sum of money in stock, (Form 1), *ib.*  
(Form 2), *ib.*
- That parties join in a conveyance for the purpose of strengthening the title, *ib.*
- Of a patent, (Form 1.) 39.  
(Form 2.) *ib.*
- Of contract for purchase and agreement as to the apportionment of the purchase-money, 172.
- Of the desire of purchaser to have the premises re-conveyed, 173.
- In the assignment of several terms to attend, 180.
- Of contract for sale, and intention to charge the hereditaments sold, with an annual payment, 275.

**RENT-CHARGES AND ANNUITIES:**

- Limitation of, 275.

**SETTLEMENT:**

- Power for parents jointly, and survivor, to appoint lands among children, 71.
- Ultimate trust in marriage-settlement of personalty, part for husband and part for wife in default of issue, 75.  
for wife in default of issue, 76.  
for husband in default of issue; 77.
- Limitations in strict settlement, 80.
- For benefit of creditors trusts in for collecting debts, 78.

**TRUST:**

- Of copyhold, in a settlement to correspond with uses of freehold, 49.
- Of a living till one take holy orders, *ib.*
- Of yearly payment for *feme covert* by reference, 50.

**TRUST—***(continued.)*

For collecting debts, 78.

Ultimate, in marriage-settlement of personalty, part for husband and part for wife, 75.

For wife in default of issue, 76.

For husband in default of issue, 77.

Declaration of, in a rent-charge, .

**TRUSTEES :**

Declaration that clauses for appointment, indemnity, &c. of, shall be applicable to other deeds, 50.

Declaration in articles for clauses for the appointment and indemnity of, *ib.*

**VESTRY :**

Recital of a provisional agreement subject to the approbation of, and confirmation by, 33.

**WILLS :**

Commencement of, 106.

General devise to trustees for a term, *ib.*

Declaration of the trusts of the term, 107.

Declaration as to the power given to trustees for the payment of debts out of real estate, 108.

Personal estate, nevertheless, to be the primary fund for payment of debts, *ib.*

Proviso for converting tenant in tail, born in testator's lifetime, into tenant for life, 109.

Proviso for taking name and arms,—and for that purpose to apply for an act of parliament;—limitation over in default of using name and arms,—and disposition of the intermediate rents and profits, 110.

Powers for tenants for life to jointure, 113.

Limitation of the total amount of jointures, 114.

Powers to raise portions, *ib.*

Limitation of the total amount of portions, 115.

Power of leasing to tenants for life, 116.

Power of sale, the purchase-money to go upon the trusts of the personal estate, *ib.*

Power of exchange, 117.

Devise of copyhold upon the same trusts as freehold, 118.

Devise of leaseholds upon trusts after declared, 119.

Declaration of the trusts of leasehold, 120.

As to the family residence, 121.

Bequest of pictures, books, furniture, &c. *ib.*

Directions for the preparations of an inventory of the plate and jewels may be re-fashioned, &c. 122.

Bequest of residue and appointment of executors, *ib.*

Provision for appointment of new trustees, *ib.*

Bequest by codicil, 123.

# INDEX

## OF PRINCIPAL MATTERS.

---

ACTS OF PARLIAMENT. See *Estate Bills*,—*Naturalization Bills*.

ARTICLES. See *Partnership*.

### ASSIGNMENTS:

#### 1st. Of long leasehold on a sale of them.

Title to, 205.

Mode of proceeding where the original lease is lost, *ib.*

General form of assignment, 206.

The most usual defects in title to such property, 207.

#### 2d. Of the assignment of lands held by a lease for years, under ecclesiastical or other corporations.

Title to leasehold for years, held under ecclesiastical and other corporations, 207.

Where there is *tenant right* the title should be traced back as far as there is notice of trusts, 208.

As to the probate of wills in deducing the title to leaseholds, 209.

General form of the assignment, *ib.*

Purchaser's covenants, 210.

Of the sale of leasehold in lots, *ib.*

#### • 3d. Of the assignment of terms to attend the inheritance.

Recitals in, 210.

Trusts of the term on a sale, 211.

on a mortgage, *ib.*

on a settlement, *ib.*

Effect of the words "assigned and surrendered," 212.

Of several terms, *ib.*

Deduction of the title to an attendant term through executors, *ib.*

There should always be an actual assignment to a new trustee, 213.

#### 4th. Of the assignment of choses in action, *ib.*

Legacies, &c. how far assignable, 214.

Of a legacy payable to a person abroad, 215.

Persons having only particular estates and paying off incumbrances should take assignments of them, 216.

**ASSIGNMENT—(continued.)**

Legacies may be assigned by way of mortgage, 216.

*Celles que trust* of money to arise from sale of lands may assign their shares, *ib.*

Precautions to be observed by a person purchasing an equitable interest, 217.

Where the legal estate is outstanding, priority of time does not alone decide, 218.

Notice to the trustee not necessary if the purchaser of an equitable interest mean to rely on his contract with the individual, 220.

In case of a debt, notice to the debtor is in many cases tantamount to possession, 221.

Notice to the legal holder is always necessary on the part of the assignee, 223.

**COMPOSITION DEEDS**, general provision of, 281.

**CONVEYANCE :**

By assignees of bankrupt, 180.

By trustees for sale, 181.

To trustees on their investing trust-money, 182.

By trustees to particular uses, where the trusts have been performed, 183.

By infant trustee of legal estate, *ib.*

Recitals on conveyance by a naked trustee, 184.

Where an estate is sold in lots by a person having a term and the reversion in different rights, 185.

Of an estate subject to a mortgage, 190.

where part of the purchase-money is to remain on the security of the estate, 191.

where part of the purchase-money is to be paid by instalments.

**COPYHOLDS :**

Reason for having a deed of covenant, 124.

Where sold in lots, 125.

Covenant for production of deeds, *ib.*

Custom of, in the county of Durham, 125, 127.

Incumbrances on, 126.

Are within 6 Geo. 4, *ib.*

Right in, may be released, *ib.*

The equitable estate in, may be released, *ib.*

Cannot be extended, 127.

General plan of the mortgage of, 129.

Covenants on mortgage of, *ib.*

Term cannot be created of, 130.

**COVENANTS :**

For title, 56.

on a sale, 186.

Against whose acts vendor should covenant, 187.

by persons claiming their shares in different rights, 187.

when several persons join in a sale, *ib.*

Effect of the words "promise and agree," 188.

COVENANTS—(*continued.*)

Order in which ancestors should be named in covenants against their acts, *ib.*

With whom covenants for title should be entered into, 188.

Construction and meaning of the covenant for quiet enjoyment, *and that* free from incumbrances, *ib.*

Meaning of the words "acts and means," and of "permit and suffer," 189.

Covenant for further assurance, 189.

Of mortgagor and vendor, difference between, 56.

By trustees, *ib.*

For production of title-deeds, and other covenants sometimes occurring in purchase-deeds, &c. *ib.*

Request and costs, by whom to be made and paid respectively, 57.

That mortgagor will join in sales under the trust, 140.

For production of deeds, 125.

On mortgage of copyholds, 129.

In leases, 164.

For quiet enjoyment, 167.

Against overstocking grass land, 166.

To levy a fine, 176.

DEEDS. See *Execution of deeds.*

Observations on, 1.

## DECLARATIONS.

General observations on, 47.

Several forms of, 48.

What are proper in a second mortgage, 137.

As to an attendant term in a second mortgage, 139.

## DOWER:

Of the limitation to bar, 177.

Mr. Butler's observations on the form of these limitations, *ib.*

## ESTATE BILLS:

Nature of a conveyance by act of parliament, 255.

Objects for which private acts are usually applied for, *ib.*

Generally originate in the House of Lords, 257.

Parliament cautious in passing them, *ib.*

Of the petition for leave to bring in the bill, *ib.*

The petition must be signed by all interested parties, 258.

Act cannot be obtained for sale of lands below which there are mines, *ib.*

As to bills meddling with settled lands, *ib.*

Standing orders of the House respecting acts for sale or exchange &c. of settled lands, 259.

Appointment of new trustees under powers of the act must be exercised by the Court of Chancery, 260.

Notice must be given to mortgagees, *ib.*

Reference of the petition to the Judges, *ib.*

## EXECUTION OF DEEDS:

By attorney, 67.

By a trustee appointed under 6 Geo. IV. 68.

By infants conveying under an order of court, *ib.*

**EXCEPTION (in leases):**

- Of plantations, 159.
- Of right of hunting, *ib.*
- Of right of way, *ib.*

**FINES:**

- Of deeds to declare the uses of fines, 231.
- Operation of fines, *ib.*
- Wife may extinguish her dower, &c. by joining her husband in a fine, 237.
- A subsisting term, when trusts have been satisfied, may be extinguished by fine, 237.
- But not an attendant term, 238.

**GRANT.** See *Rent-Charges and Annuities.*

**HUSBANDRY:**

- Scheme of, 167.

**INCUMBRANCES:**

- On copyholds, 126.

**INDEMNITY:**

- On a sale where the title is defective from want of evidence of annuitant's death, 194.

**LEASES:**

- Who can grant, 157.
- Parties, *ib.*
- Consideration, *ib.*
- Operative words, *ib.*
- Recitals, 158.
- Exception of plantations, 159.
  - right of hunting, *ib.*
  - right of way, *ib.*
- Reddendum, 161.
- Habendum, *ib.*
- Commencement of the term at different times as to the different parts of the form, *ib.*
- Days for payment of rent, 162.
- Reservation of additional rent for, &c., when proper, 163.
  - when improper, *ib.*
- Proviso for re-entry, 164.
- Covenants, *ib.*
- Preservation of timber, 165.
- Liberty for the landlord to enter and inspect, 166.
- Liberty to plough, *ib.*
- Entering on grass land, *ib.*
- Power to sow seeds, *ib.*
  - Against over-stocking grass land, *ib.*
- Covenant for quiet enjoyment, 167.

LEASES—(*continued.*)

- Away-going crop, 167.
- Mutual agreements, *ib.*
- Scheme of husbandry. *ib.*

MORTGAGES. *See Forms.*

- By demise, general scheme of, 131.
  - Advantage of mortgage by way of demise, 132.
  - Of a long term, *ib.*
  - Transfer of, 133.
  - Conversion of mortgage by demise, to one in fee, on a further advance by a new mortgagee, *ib.*
  - Where the mortgagor is not a party, 134.
  - Conversion of, to one in fee, on the advance of a further sum by the first mortgagee, *ib.*
  - Money advanced by two persons on a transfer, 135.
- In fee, general form of, *ib.*
  - Estate of the mortgagee, 136.
  - Mortgagee's remedies, 137.
  - Transfer of, *ib.*
  - Recital in second mortgage, *ib.*
  - Declaration necessary in a second mortgage, *ib.*
  - Further advance by first mortgagee, 138.
  - With trusts for sale when proper, *ib.*
  - Declaration in a second mortgage as to an attendant term, 139.
  - Transfer of, with trusts for sale, *ib.*
  - Covenant that mortgagor will join in the sales under the trusts, 140.
  - Order of the trusts in mortgages, with power of sale, *ib.*
  - Successive advances by mortgagee, *ib.*
  - Necessary parties on a transfer, where there are special limitations in the proviso of the original mortgage, 141.
  - Consequence in such a case, where all the parties can be come at, 142.
  - When a new proviso not inserted, mortgage-money should be assigned to the mortgagee, 143.
- Of leasehold, general provisions, *ib.*
  - Provisions for the renewal of the lease, 144.
  - Precautions as to the renewal of leases, 145.
  - Renewal in the name of the mortgagor, *ib.*
    - of the mortgagee, *ib.*
  - Form of mortgage where the term is only for a short period, *ib.*
- Of West Indian property, proper securities on, 146.
  - effect of, 147.

## PARTIES ;

- Who should in general be parties to a deed, 1.
- Description of, 2.
- In the reconveyance of a mortgage, 3.
- When trustees should join, 4.

**PARTIES—(continued.)**

- In an assignment of mortgage, 4.
- On sale of bankrupt's estate, *ib.*
- Order of, 5.
- To leases, 157.
- On a transfer of a mortgage, where there are special limitations in the proviso of the original mortgage, 141.
- To purchase-deeds, 169.

**PARTITION :**

- Of the various modes of effecting a partition, 225.
  - 1st. By agreement, *ib.*
    - Of the conveyance, *ib.*
    - Mode of dividing the lots where the parties cannot agree, *ib.*
    - Of copyholds, 226.
    - Partition of encumbered lands, 227.
    - Custody of title-deeds, *ib.*
    - Each party should have attested copies, 228.
  - 2nd. By bill in equity.
    - The mode of proceeding, *ib.*
    - Partition by, effect of where there are infants, 229.
  - 3rd. By act of Parliament.
    - Imperfections of partitions by bill in equity, *ib.*
    - Cases in which it is necessary to resort to Parliament, *ib.*
    - Operation of an Act of Parliament as a conveyance, 230.

**PARTNERSHIP :**

- Articles, generally necessary to ascertain the rights of the partners as to the joint property employed by them in, 246.
- The period of trading should be defined, *ib.*
- Provisions on the death of a partner, *ib.*
- Doubtful debts, sometimes directed to be excluded from the annual account, 243.
- Proviso for repayment of money lent to the concern, *ib.*
- Restriction of the partners from drawing bills &c., 243.
- Reference of disputes to arbitration, *ib.*
- Provisions as to the appointment of a successor, on the death of any of the partners, 244.
- Real estate should be vested in trustees, 244.
- Deed of settlement of an extensive company, general provisions of, 245.

**PURCHASE-DEEDS.**

- State of the title, 168.
- Parties to, 169.
- Recitals in, 170.
- The consideration, 173.
- Operative words on a conveyance by trustees, *ib.*
- The parcels, 174.
- Sweeping clause, 175.
- The clauses containing the general words, &c., *ib.*



**PURCHASE-DEEDS—(continued.)**

- General words carry tithes, 176.
- Covenant to levy a fine, *ib.*
- Estate sold subject to a rent-charge annuity, &c. the annuitant consenting, 193.
- The annuitant not consenting, *ib.*
- Indemnity where the title is defective from want of evidence of annuitant's death, 194.
- Estate to be sold, subject to payment of portions, &c., 196.
- When the estate is subject to the payment of an annual sum in perpetuity, 196.
- Title to leasehold for lives, 197.
- Mode of making out the title, where the old lease is lost, *ib.*
- Of destroying entails of leasehold for lives, *ib.*
- Recitals necessary in deeds, to lead the uses of fines of leaseholds for lives, 198.
- Conveyance of leasehold for lives, 199.
- Form of the deed, where the conveyance is from a devisee, 200.
- Effect of a renewal after a will made, *ib.*
- Operative words and parcels in conveyances of leaseholds, *ib.*
- The conveyance must be subject to the payment of rent &c., 201.
- Precautions to be observed where leasehold is sold in lots, *ib.*
- Mortgage of leasehold for lives, 203.
- Different mode of conveying leasehold, *ib.*
- Leasehold for lives devisable and chargeable as assets, by descent, *ib.* not subject to dower.

**RECEIVER :**

- Of the covenant in mortgage deeds &c., for the appointment of a receiver, 250.
- Deed for the appointment of a receiver, *ib.*

**RECITALS :**

- Importance of, 5.
- Are practically essential, 6.
- General rules to be observed in, 7.
- When evidence, 8.
- Of agreements, 9.
- Different modes of, *ib.*
- Of a deed
  - Of the style of the deed, 11.
  - Of the date, 12.
  - Of the parties, 13.
  - Of recitals, 16.
  - Of the operative part of a deed, 18.
  - Of parcels, 19.
  - Of general words, 21.
  - Of the *habendum*, 22.

RECITALS—(*continued.*)

- Of uses and trusts, *ib.*
- When trusts have been partly fulfilled, 25.
- Of provisoes, considerations &c., 26.
- Of powers of sale, 27.
- Of a fine, 40.
- Of the effect of a deed, *ib.*
- In second mortgage, 137.
- In purchase-deeds, 170.
- In recovery deeds, 233.
- In purchase-deeds, where the estate is vested in trustees in naked trust.

## RECONVEYANCE :

- By mortgagee of freehold, 246.
- On the reconveyance of copyholds there should be a deed of covenants, 247.
- Of mortgaged lands which have been devised or descended, *ib.*
- Effect of the surrender of a term, on a mortgage by demise of freehold, *ib.*

## RECOVERY DEEDS :

- Husband alone may make tenant to the *præcipe* of the wife's lands.
- Tenant to the *præcipe*, 232.
- Recitals in, 233.
- Recovery of an advowson previous to re-settlement, *ib.*
- Declaration of the trusts of a recovery, 234.
- Operation of equitable recoveries, 236.
- Wife's dower, annuity &c., may be extinguished, by being vouched in a recovery, 237.
- May in certain cases be amended, 238.
- In what case treble voucher may be necessary or proper, 239.
- Where the title to an estate depends only on descents a recovery should be suffered, 240.

## RE-ENTRY :

- Proviso for, 164.

## RENT-CHARGES AND ANNUITIES :

- Grant of, out of freehold, 265.
- of leasehold, *ib.*
- of leasehold and freehold, *ib.*
- Mode of charging an annual payment by deed.
- Proportionate part should be secured to the representative of the grantee, 266.

## SETTLEMENT :

- Of personal estate
  - The property of intended wife, 69.
  - General plan of, 70.
  - Proper powers in for trustees, 72.
- Settlement of stock, 73.
- Proper form of limitation of wife's personal estate, *ib.*
  - Of leasehold, 74.
- Of leasehold and freehold together, *ib.*

SETTLEMENT OF REAL ESTATE—(*continued.*)

## Of real estate

- General form of, 79.
- Effect of limitations in strict, 81.
- Forfeiture by the tenant for life, *ib.*
- Jointure annuity, 82.
- Effect of a recovery by the eldest son, tenant in tail, 83.
- Of the raising and paying portions, *ib.*
- Estate of the daughter under it, when there are no sons, 84.
- Portions for daughters having become vested (though not raised) do not merge on the failure of issue male, 85.
- The wife's fortune should be applied to discharge incumbrances on the settled estates, 85.
- Conveyance to trustees for sale, for the purpose of discharging incumbrances, and the residue to be settled, 86.
- Settlement of copyholds, 87.
- To the exclusion of the husband, 88.
- Rent-charge to wife, and no provision for children, 89.
- Settlement of the wife's estate, *ib.*
- Trust of the term of such a settlement, 90.
- Clause of survivorship, 91.
- Maintenance, *ib.*
- Proper for the wife to have the disposal of a gross sum out of the estate where it is her own property, 92.
- All outstanding legal estates should be got in, *ib.*
- By persons in trade, 93.
- Effect of a limitation to "survivors or survivor" only, 94 (*note*).
- Of an undivided share, 227.

## TENANT IN TAIL :

- Effect of conveyance by, 238.

TERMS. See *Assignment*.

## Outstanding,

- Mortgages of, 179.

- Assignment of, 180.

- Recitals on Assignment of several, *ib.*

## TRANSFER :

- Of a mortgage by demise, 133.
- Where money advanced by two persons, 135.
- Of a mortgage in fee, 137.
- With trusts for sale, 139.

## TRUSTEES :

- New, appointment of, when power for necessary, 47
- In case of freehold estate, 278.
- Leasehold, *ib.*
- Freehold and leasehold, 279.
- Appointment of by Court of Chancery, 280.

## USES :

- Conveyance to, 43.

**WILLS:**

Of real and personal estate, provision in,—annuity for widow,—limitations to children, 95.

Trusts of the term, 96.

Portions, 97.

Disposition of the surplus, 98.

Debts &c. when they should be charged on the real estate, 99.

Disposition of the personal estate when it is inconsiderable, *ib.*

Of the surplus when it is inconsiderable, 100.

Power to charge the real estate, for the purpose of purchasing contiguous lands &c. *ib.*

Settlement of leasehold, 101.

Fee, and not a term should be vested in trustees, where the trusts are complex, or the real estate much incumbered, *ib.*

Form of a will, where testator has a small landed estate, 102.

Trust to sell, 103.

Provision for debts and annuity for widow, 104.

For children when young, *ib.*

For children when nearly of age, *ib.*

When the children are young, the widow should be authorized to settle and allow trustees' accounts, 104.

Mode of raising the widow's annuity, 105.

Form of will when property is small, *ib.*

Where testator wishes to provide for an extravagant son, &c., 106.

Points to be attended to in bequeathing a legacy, *ib.*

For a variety of forms, *see* p. 106.

**WITNESSING CLAUSE:**

Of the consideration, 40.

Operative words, 41.

Parcels, 42.

Habendum, *ib.*

Conveyance to uses, 43.

Of terms, 44.

Of merger of, 45.

Of terms in marriage settlement, *ib.*

Of assignment of terms, 46.

Terms to support &c., *ib.*

Power to appoint new trustees, 47.

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